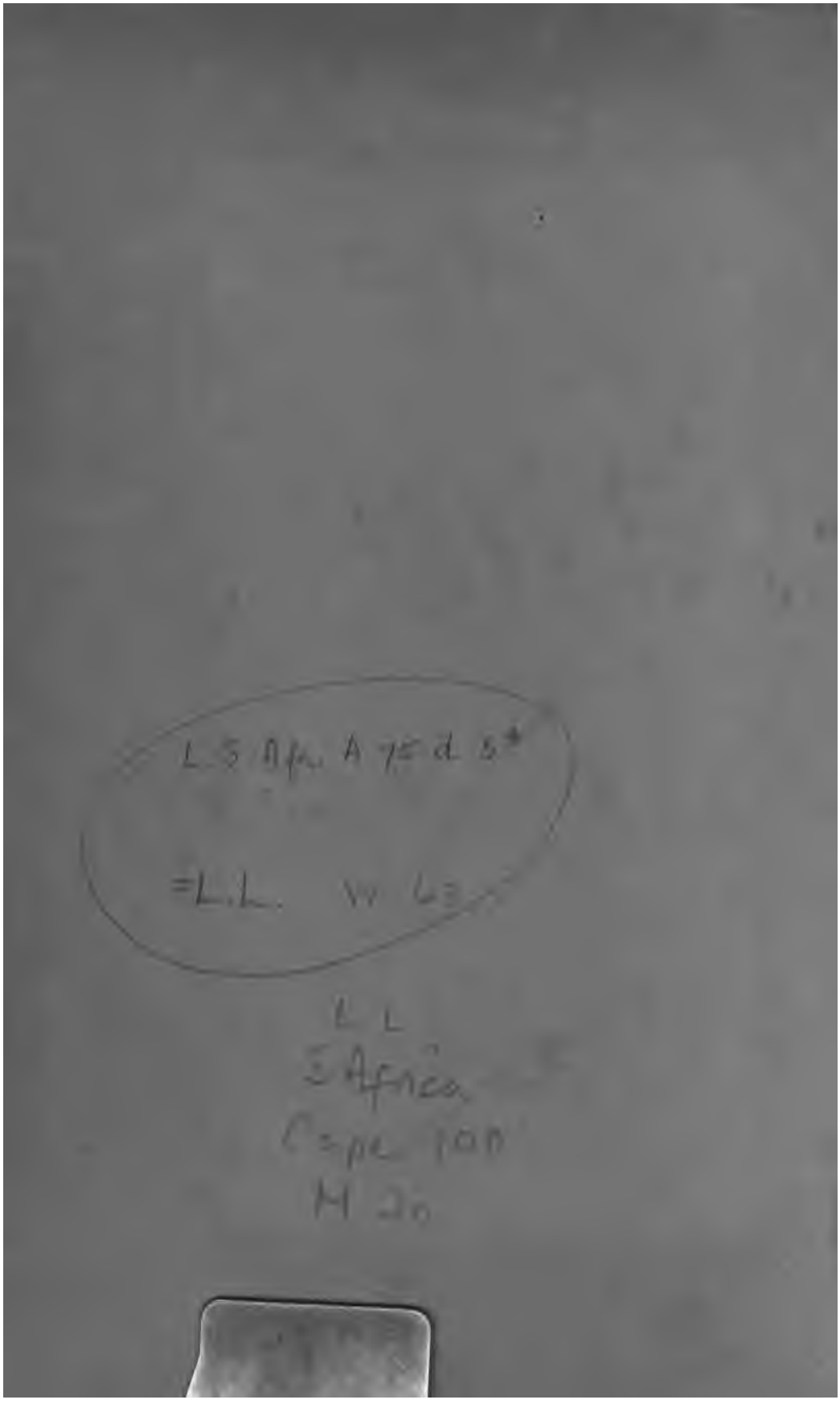
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Cape Town

1908.

INDEX AND DIGEST OF CASES

DECIDED IN

The Supreme Court

OF THE

CAPE OF GOOD HOPE,

AS REPORTED BY THE LATE

HON. WILLIAM MENZIES, ESQUIRE,

(SENIOR PUISNE JUDGE OF THE SUPREME COURT).

COMPILED BY

JAMES BUCHANAN,

ADVOCATE OF THE SUPREME COURT.

VOL. I.

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BETWEEN THE

YEARS 1828 AND 1850.

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MUSGRAVE, J. *Appointed Oct.* 12, 1843.

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E. J. BUCHANAN.

CHAMBERS, ST. GEORGE'S STREET,
CAPE TOWN,
5th January, 1877.

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ANATOCISMUS—Accumulation of interest on interest, and not interest on capital. *Maynard* v. *Malan* 299

2. ——— Whether anatocismus received into the law of Holland. *Ibid.*

3. ——— Anatocismus cannot be founded on or pleaded against a *bonâ fide* onerous assignee of a bond which sets forth *in gremio* a legal *causâ debiti*. *Ibid.*

ANIMUS INJURIANDI: *See* INJURY.

ANTE-NUPTIAL CONTRACT—Where three trustees had been appointed under an ante-nuptial contract, containing certain provisions for the benefit of the wife and children of the marriage, which ante-nuptial contract was not entitled to registration so as to secure the provided benefits, by reason of its not having been properly witnessed, the Court, on action brought by one of the trustees (another intervening during the progress of the suit, subsequently to the marriage, the third being specially averred to be out of the colony), decreed that a formal notarial deed should be drawn up according to the articles of the informal ante-nuptial contract, to the satisfaction of the master of the Supreme Court. And the Court further decreed that thereupon the husband should proceed to carry out the aforesaid provisions. *Postea*—The husband having failed to carry out one of the provisions of the notarial deed, which the Court had decreed to be executed, and in which the trust had been accepted by one only of the three intended trustees, the Court, by a majority, held that a claim for civil imprisonment could be maintained by this one without his infended co-trustees being joined, to enforce compliance with the terms of the decree. *Twentyman and another* v. *Hewitt* 156

2. ——— Where by the terms of an ante-nuptial contract it was stipulated that there should be community of property, subject to this exception, however, that certain property belonging to the wife in her own right should be vested in trustees (appointed for that purpose by a separate deed of even date with the ante-nuptial contract), as the sole and separate property of the wife, the interest to be duly paid to her, and the property so vested to be not otherwise disposed of than by last will,—it was held by the Court that the appointment of trustees for the above purposes could not be revoked by the wife after marriage, nor by the husband and wife jointly. *Buissinne and another* v. *Mulder et Uxor* 162

3. ——— Where an amount settled on a wife, then a minor, by ante-nuptial contract, has not, as stipulated by the contract, been secured by mortgage on landed property, but becomes merged in the private funds of one of the trustees after the wife's majority, no tacit hypothec is created for such amount on the insolvent estate of such trustee. *In re Wright* 166

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5. ANTE-NUPTIAL CONTRACT—An ante-nuptial contract in the Hebrew language, containing a marriage settlement, and professing to be founded on the laws and customs of the Jews, made at Charleston, in North America, and alleged to have been registered in the Secretary of State's office in Charleston, is not *primâ facie* entitled to be ranked in preference, in a question with the husband's creditors. Its due execution must be proved, parties ordered to file pleadings. *Heinemann's Creditors* v. *Garritson, Wife of Heinemann* 173

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7. ——————————— Husband and wife being married out of community, and the wife's estate having been, after her death, surrendered as insolvent, the Court held that the husband became a creditor of the wife, for interest on debts of hers, which interest was paid by him during the marriage, but had become due before the marriage; but that he did not become a creditor for such interest paid by him, which became due during the marriage, the fourth clause of their ante-nuptial contract having given the husband the sole disposal of all dividends and interest coming to the wife from her separate property, subject, however, to the payment of her just debts, or the interest thereof. The husband further claiming for an amount of costs which he had paid in an action instituted against his wife, and relating to her separate property, the Court held that this was a loss during the marriage, which under the second section of the ante-nuptial contract was to be borne only by the husband. *Anderson* v. *Meyer and others* .. 204

8. ——————————— Where a husband, married out of community by ante-nuptial contract, ceded a bond, the separate property of his wife, by virtue of a general power of attorney from her in his favour, cession held good, independently of the circumstance that the wife had not in the ante-nuptial contract reserved to herself the administration of her separate property. *Laing* v. *Zastron's Executrix* 229

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2. ——— of "Good-fors" (thirteen to sixteen years), sued on by executors, coupled with other circumstances,—viz., that no claim had been made by the deceased creditor in his lifetime, although the debtor's immoveable property had been sold expressly for payment of his debts, which had been called in by advertisement in the 'Gazette,'—held a good defence against a claim for provisional sentence. *Schiller, Executor of Cloete* v. *Horak* 28

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3. ——— An appeal is not competent against a decree of civil imprisonment in execution of a judgment not appealed against. *Nisbet & Dickson* v. *Richardson* 474

4. ——— An Appeal from a Circuit Court is not competent, under the Charter of Justice, section 43, unless security is given within fourteen days, in conformity to the 44th section of the Charter. *Seton* v. *Bresler* 503

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2. ——— An agreement to submit all future disputes to the arbitration of uncertain persons, cannot be enforced by the Court, unless the parties have themselves in the agreement assessed the amount of damages for non-performance by stipulating a certain penalty for non-performance. *Schmidt* v. *Francke* 334

3. ——— Indemnification ordered by arbitrators to be given to the plaintiff by the defendant, means merely his personal indemnification, and not good security from third parties to indemnify. *Wells* v. *Mackenzie q.q. Campbell* 379

4. ——— An award set aside (after being made a rule of court and writ of execution issued but without notice to plaintiff) for certain informalities and irregularities in the appointment of the umpire, and in the hearing of the case in the absence of one of the parties. *Dietz* v. *Pohl* 397

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ASSIGNATION—Of debt is completed by delivery of the instrument having an act of cession indorsed thereon. *Smuts* v. *Stack and others* 297

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ASSIGNEES—Proof by affidavit of capacity of English, assignees insufficient. *Nisbet & Dickson* v. *Venables* 304

ASSIGNMENT—From the creditors under the sequestration to an insolvent (although since rehabilitated) who was the holder and also the payee of a bill of exchange, drawn before his estate had been sequestrated as insolvent, necessary to give him title to sue thereon. *Barry* v. *Bailey* 83

ATTACHMENT—Against the property of the husband who was about to depart from the colony, obtained by the wife, who had commenced proceedings for a separation *à mensâ et thoro*, for the security of her half of the common property. *Rabie* v. *Rabie* 241

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ATTORNEY—Where on a voluntary separation an attorney of the Court was appointed by the husband as his agent in the administration of the joint estate, the Court held that such attorney was entitled only to commission as agent, and not to fees as an attorney. *Trustee of Ziedeman* v. *De Wet* 237

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2. ——— Liquidity of an accepted bill of exchange is not affected by the fact that it was not addressed to any person. *Holtman* v. *Dormehl* 14

3. ——— Presentment of bill of exchange must be proved in a provisional claim against the drawer, although the acceptor became insolvent before the bill was due. *Thompson & Co.* v. *Archer* 61

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5. ——— Provisional sentence refused against the acceptor of a bill of exchange payable at a particular place, because presentment at such place was not duly alleged in the summons and proved. *Simpson Brothers & Co.* v. *Allingham* 62

6. ——— Provisional sentence refused on a bill or order payable on a contingency, respecting which extrinsic proof would be required. *Geert* v. *Van As* 62

7. ——— The drawer of a bill of exchange not provisionally liable to the acceptor who has paid the bill, since such payment may have been made out of the drawer's own funds. *Norden* v. *Stephenson* 63

8. ——— Possession of a bill of exchange by one of three joint acceptors, coupled with an acknowledgment on the face of the bill from the holder that the amount had been received from him, does not afford such presumption of payment by this one only as to entitle him to sue the other two provisionally for their shares. *Gie* v. *De Villiers* 63

9. ——— Provisional sentence refused against one of the drawees of a bill of exchange, of whose acceptance, alleged to be by "mark," no evidence appeared *ex facie* of the document. *Carstens* v. *Hendriks* 64

10. ——— An acceptance of a bill payable on a contingency requiring extrinsic proof is illiquid. Provisional sentence refused accordingly. *Norton* v. *Speck and another* 65

11. ——— Provisional sentence against the drawer of a bill is barred by non-allegation of presentment to the acceptor, in the summons. *Ibid.*

12. ——— Provisional sentence refused against the drawer of an unaccepted bill of exchange payable after sight, in respect that there was no protest alleging presentment for acceptance or sight to the drawer, though a protest for non-payment was produced. *Phillips and King* v. *Ridwood* 66

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14. BILL OF EXCHANGE—How far the allegation of nullity of the debt, as arising from a gambling transaction, is a defence to provision where the instrument of debt (being a bill of exchange or order) expressed no *causa debiti*. [The Court being equally divided in opinion, no judgment was given.] *Freshfield* v. *Harries* 83

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20. ——— Notice to the drawer of non-acceptance by the drawee, or of no funds, necessary from original payee or subsequent holder. Such notice, given by a third party having no interest in the bill, is insufficient. *Venning q.q.* v. *Venables* .. 315

21. ——— Foreign bill of exchange payable after sight must, within a reasonable time, be presented for acceptance, or put into circulation. What is a reasonable time, judged by custom of the place where drawn; if none, then by the circumstances of the case. Three months not an unreasonable time for a bill drawn in this colony on England. *Ebden* v. *Liesching* 349

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3. —— Provisional sentence given on a bond [Wylde, C.J., diss.] for the amount therein acknowledged, although certain clauses of the bond gave the defendant the liberty of making payment in fungibles by a certain date, and on his default entitled the creditor to purchase such fungibles at the defendant's expense, that certain date having passed and the defendant having made default before action brought. *Letterstedt* v. *Watney* 16

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7. —— Provisional sentence granted on a bond which referred to a collateral document showing the consideration thereof, without production of such document. *Thom* v. *Thom* 19

8. —— Where the debtor on a bond had given the legal notice that he would pay up his bond to his creditor, the creditor, on default of such payment, is entitled to claim payment without giving notice calling in the bond. The legal effect of the usual clause in the bond, as to notice, being, that either party may give such notice. *Krynaauw* v. *Gildenhuysen* 20

9. —— Where it is stipulated in a mortgage bond that three months' notice shall be given calling in the bond, and, further, that unless the interest be paid on the day on which it falls due, the principal and interest shall be considered as due without notice, provisional sentence will, on non-payment of the interest, be given for capital and interest, where there has been no notice calling in the bond, or demand by plaintiff of the interest, notwithstanding that the bond also contains the usual clause requiring such notice. *Faure* v. *Wright* 21

10. —— Where defendant, as executor, had given notice to creditors to lodge claims, in terms of the 30th section of Ordinance No. 104, the plaintiff, who had lodged his claim, was held entitled to claim payment of his bond without giving the usual legal notice. *Southey* v. *Borcherds, Executor of Dormehl* 22

11. —— Affidavits held incompetent to prove a defence in a provisional case, of want of consideration of the bond sued on. [*Sed vide* note.] *Cullen* v. *Cullen* 22

12. —— Provisional sentence granted against a wife married out of community, who had bound herself *in solidum* as surety and co-principal debtor for her husband (since become insolvent), on a bond in which she renounced her *beneficia*, without production of evidence to show that she was not unduly influenced by her husband in the execution of the bond, which was *ex facie* entirely for his benefit, and without requiring the appointment of a *curator ad litem* to act for the wife. *Nourse* v. *Steyn, Wife of Griffiths* 23

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CITATION—Application on motion for a citation calling on a plaintiff to bring a new action, or in default to be barred therefrom, and perpetual silence imposed, refused. *Muller* v. *Langeveld* 94

2. ——— EDICTAL—What is due publication of a citation in an action for divorce. *Reeves* v. *Reeves* 244

3. ——— What is sufficient service of citation in an action for divorce. *Campbell* v. *Campbell* 252

4. ——— There must be personal service of the decree for restitution of conjugal rights to found an action for divorce. *Gough* v. *Gough* 257

5. ——— Divorce granted where the defendant, the wife, was absent from the colony, after she had been duly cited. *Barker* v. *Barker*; *Bestandig* v. *Bestandig* 265, 280

CIVIL IMPRISONMENT—In an application for civil imprisonment the defendant must be served with a copy of the judgment, as well as a copy of the writ and the sheriff's return of *nulla bona*, and where a copy of the judgment had not been so served the court granted the defendant fourteen days to see it. *Wolff* v. *De Villiers* 24

2. ——— Where provisional sentence was granted on a promissory note given by an insolvent after sequestration (under the Ordinance, No. 64), for a new debt contracted subsequently to such sequestration, no execution can take place against his property while under sequestration, nor probably against his person by decree of civil imprisonment, until the proceedings under the sequestration had reached the stage at which a decree of civil imprisonment may be obtained by the creditors. *Norden* v. *Magadas* 45

3. ——— Summons for civil imprisonment against two defendants held bad for misjoiner where founded on two separate judgments in two different actions, although for the same debt. *Van den Berg* v. *Van Dyk* 126

4. ——— Where a husband had failed to carry out one of the provisions of the notarial deed, which the Court had decreed to be executed in terms of the articles of an informal antenuptial contract, and in which the trust had been accepted by one only of the three intended trustees, the Court (by a majority, Menzies, J., *diss*), held that a claim for civil imprisonment could be maintained by this one, without his intended co-trustees, to enforce compliance with the terms of the decree. *Twentyman and Another* v. *Hewitt* 156

5. ——— Return of *nulla bona* sufficient *primâ facie* proof of no property. It is for the debtor to prove he possesses property. *Langeveld* v. *Tyrholm* 314

6. ——— Summons for civil imprisonment expired, by reason of plaintiff not appearing on the day for which case was

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allowed to stand over, cannot be revived by mere notice. *Schutte* v. *Wylde* 403

7. CIVIL IMPRISONMENT—Where a decree of civil imprisonment has been granted on a judgment, such decree cannot be appealed from when the judgment itself has not been appealed from. Civil imprisonment granted, notwithstanding petition for leave to bring such appeal. *Nisbet & Dickson* v. *Richardson* 474

8. ——— An insolvent, after the liquidation account has been confirmed, is entitled to oppose a decree for civil imprisonment by objecting to the legality of the claim proved in his estate, he having raised the objection to his trustee before the confirmation of the account, but without avail. *Villiers* v. *Le Riche* 518

9. ——— Decree of civil imprisonment discharged during sequestration of estate, and insolvent liberated (under Ordinance 64). *In re Hoffley* 526

COLLECTORS OF REVENUE—Legal hypothec of government on property of, not impaired by taking sureties from such collectors. *In re Insolvent Estate of Buissinne, Van der Byl and Meyer* v. *Sequestrator and Attorney-General* .. ..

2. ——— Legal hypothec of government on property of, commences from date of appointment and not of default. *Ibid.*

COMMISSION—Where a promissory note contains a penal stipulation (*e.g.* 5 per cent. for collection of the note, if not paid), provisional sentence can only be obtained for the amount of the note and not of the penalty, inasmuch as the plaintiff's damages in respect of it cannot be liquidly proved. *Steytler* v. *Smuts* 40

———: *See* AGENT.

COMMUNITY—A. and B. being married in community of property, A. died, leaving his property, after payment of his debts, to certain heirs appointed in his will. After his death B., the wife, mortgaged moveable property of the joint estate for money lent after A.'s death, and the mortgagee obtained judgment against her for the amount and attached the property; whereupon, on action brought by one of A.'s heirs, the Court cancelled the mortgage, as having been granted by the widow *non habente potestatem*, and quashed the attachments. *Molle* v. *Executors of Van den Berg* 209

2. ——— Where, during the community, the husband had entered into a suretyship for which he became liable, and had afterwards surrendered his estate as insolvent, the Court held that the surviving widow, who had nothing out of the joint estate at the death of her husband, but had since acquired property of her own and had not duly repudiated or abandoned her interest in the joint estate at the time of her husband's death, may be sued for half the amount of the suretyship. *Brink* v. *Louw* 210

3. ——— Where a woman at the time of her marriage in community was entitled to an interest in a trust estate jointly with others, and after the dissolution of the community by her husband's death, she sold her share in the above interest, then, if this interest ever legally came into the community, what she sold as her share must be considered to be half of her original share, the other half being then vested in her husband's executors, if this interest did not legally come into the community then what she

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sold as her share must be the whole of the original share. *Pappe* v. *Home, Eagar, & Co. and Bam's Executor* 212

4. COMMUNITY—The interest of a wife, married in community at the Cape of Good Hope, in a trust estate in real property, situated in England, must be regulated by the law of England, and does not fall into the community. *Ibid.*

5. ———— The interest of a wife married in community at the Cape of Good Hope, in a trust estate in personal property in England, must be regulated by the law of the Cape of Good Hope, as the matrimonial domicile, and falls within the community. *Ibid.*

6. ———— Where, in the terms of a mutual will, made by two persons married in community, the survivor was entitled to the usufruct of the inheritance of a minor child, under the burden of maintaining and educating the minor,—and the mother, surviving, had for some years allowed the interest of the minor's inheritance, except a small annual amount for his maintenance, to accumulate in the hands of the Master of the Supreme Court, as guardian of the minor, who at the same time administered his property,—the Court held that the plaintiff, who had married the widow in community, and who had also for several years after his marriage with her allowed the interest to accumulate as before, was entitled to bring an action for the recovery of the interest accumulated both before and after his marriage, as being property of the community. *De Smidt* v. *Burton, Master of the Supreme Court* 222

————: *See* NON-COMMUNITY; ANTE-NUPTIAL CONTRACT.

COMPARUIT: *See* COSTS. 5.

COMPENSATION — The purchaser of landed property at public auction is entitled, when provisionally sued on the conditions of sale for the first instalment of the purchase-money, to compensate, as against such instalment, the amount of a bond on the same property of which he was the holder. *Eaton, N. O.* v. *Johnstone* 90

2. ———— *Held,* not allowable to the Orphan Chamber, as representing one estate, to compensate a debt due to that estate, against a creditor claiming on another estate also administered by the Chamber, although such had been its practice. *Buchenroder* v. *The Orphan Chamber* 308

3. ———— Money expended by the master of a ship for repairs in intermediate ports, not allowed to be compensated with freight due by master as charterer. *Hornblow* v. *Fotheringham* .. 352

4. ———— Under what circumstances compensation is allowed of inheritance of minor grandchildren, with debt of their father due to grandfather. *Richert's Heirs* v. *Stoll and Richert* .. 566

CONDITIONS OF SALE—Sureties signing conditions of sale liable to be proceeded against on provision. *Orphan Chamber* v. *Sertyn and Others* 25

2. ———— In a provisional claim on conditions of sale, for the first instalment of landed property purchased at a public auction, the defendant is entitled to compensate the amount of a mortgage bond over the same property, of which he was the holder. *Eaton, N. O.* v. *Johnstone* 90

CONDONATION—Cohabitation for two or three days after a know-

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ledge of the husband's adultery is not proof of condonation by the wife. *De Wet* v. *De Wet* 268

2. CONDONATION—*Onus probandi* lies on the defendant in the suit. *Ibid.*

3. ——— Delay of judicially separated wife for any length of time after her knowledge of her husband's adultery, before bringing action for divorce, does not constitute condonation. *Van Dyk* v. *Van Dyk* 278

CONFESSION OF JUDGMENT—Cannot be made by a widow re-married (although out of community and excepted from the *jus mariti*) to a second husband, for the amount of a *kinderbewys* executed before the second marriage, by which the paternal portions of the children of the first marriage had been ascertained, she being under legal guardianship of her husband and having no *persona standi in judicio* without him. *Prince q.q. Dieleman* v. *Anderson and others* 176

CONJUGAL RIGHTS—Decree of restitution of conjugal rights not competent on motion. *Van Blerk* v. *Van Blerk* 255

2. ——— Where obedience was refused by a wife to a decree of restitution of conjugal rights, divorce granted. *Mackay* v. *Mackay* 256

3. ——— Judgment for restitution of conjugal rights is sufficient proof of the marriage in the subsequent action for divorce for malicious desertion. *Van Blerk* v. *Naude* 257

4. ——— To obtain a decree of restitution of conjugal rights in order to entitle the plaintiff to a divorce on the ground of malicious desertion, the evidence must be clear that the desertion has been wilful. *Gough* v. *Gough* 257

5. ——— Claim for conjugal rights made in an action brought for divorce for malicious desertion. *Ibid.*

6. ——— A husband is not entitled to bring an action for restitution of conjugal rights until a voluntary extra-judicial contract of separation between them has first been annulled by a competent Court. *Botha* v. *Botha* 259

CONSIDERATION—Where a collateral document is referred to in a bond, as showing the consideration thereof, such document need not be produced or founded on in claiming a provisional sentence. *Thom* v. *Thom* 19

2. ——— Affidavits held incompetent to prove a defence of want of consideration in a provisional case on a mortgage bond. [*Sed vide note.*] *Cullen* v. *Cullen* 22

3. ——— Provisional sentence granted where the consideration of a promissory note was alleged to be usurious. *Rens* v. *Horak*; *Muller* v. *Redelinghuys & Van Reenen* 40, 41

4. ——— Provisional sentence granted on two promissory notes for £70, given at the same time, for coals sold; although the coals on one note had long been delivered, and those on the other rejected as bad, the plaintiffs not admitting the defendant's right so to reject, and the defendant not being able to prove his right by the production of liquid proof instanter. *Collison & Co.* v. *Eksteen* 46

5. ——— Provisional sentence given in favour of a *bonâ fide* holder of a promissory note against an indorser in blank, who

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alleged want of consideration between him and the party to whom he delivered the note for a specific purpose not performed. *Elliott Brothers* v. *Breda & Beale* 47

CONSIGNEE—Cannot be sued provisionally on account-sales rendered by him. *Trimbey* v. *Harris* 54

CONTRACT—Between spouses, *stante matrimonio*, not constituting directly or indirectly a donation, is valid as far as regards themselves. *Ziedeman* v. *Ziedeman* 238

2. ———— An engagement by a merchant of a clerk, held to be a contract by the month. *Venables* v. *Jarvis* 314

———— *See* ANTE-NUPTIAL CONTRACT.

COSTS—Double costs granted as a penalty for *malâ fide* denial of signature. *Deneys* v. *Daniel* 44

2. —— Where provisional sentence was given on a promissory note where the signature had been previously denied, and the plaintiff had then failed to prove the same, provisional sentence was refused for the costs to which the plaintiff had been put by the denial. *Birkwood* v. *Van Rooyen* 50

3. —— Provisional sentence refused on a bill of costs where it did not appear that the same had been taxed in the presence of the party, or after due notice given to him to attend the taxation. *De Wet* v. *Meyer* 59

4. —— Provisional sentence refused in an action by an attorney against his client, the plaintiff in a previous action, on a taxed bill for the costs of that action, which the defendant therein had been condemned but had failed to pay. *Dickson* v. *Gildenhuys* 60

5. —— Costs of comparuit given on withdrawal of a provisional case. *Ibid.*

6. —— On a claim by a husband, married out of community, against his wife for costs which he had paid in an action instituted against his wife, and relating to her separate property, the Court held that this was a loss during the marriage, which, under the ante-nuptial contract, was to be borne by the husband only. *Anderson* v. *Meyer and others* 204

7. —— Costs given against the guilty wife in an action for divorce by reason of her adultery. *Hablutzel* v. *Hablutzel* 276

8. —— If a guilty defendant, in an action for adultery, is entitled to no estate, either separate or as her share of the community, her attorney will be entitled to have his costs, incurred before the decree, out of the common estate. *Ibid.*

9. —— Provisional sentence granted on a taxed bill of costs. *Commissioner for the Sequestrator* v. *Vos* 286

10. —— Security for costs not exigible from a plaintiff who is an *incola*, nor from one who, although not an *incola*, has immoveable property in the colony. *Witham* v. *Venables*; *Malan* v. *Ziedeman* 291

11. —— Security for costs not exigible from a plaintiff a military man in service at the camp, he being considered an *incola*. *Dunlevie* v. *Harrington & Gadney* 292

12. —— Must be paid before any renewal of proceedings in the same case, if taxed and demanded. *Deneys* v. *Stoffberg* 301

13. —— A trustee held personally liable for costs when, in a question as to a purchase at a sale, he defended the action without

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reference to the purchaser. *Meybergh* v. *The Commissioner for the Sequestrator* 345

14. COSTS—An attorney not allowed costs for proceeding in the name of a dead party, where the death was known to him. *Heartley* v. *Poupart, Attorney of McCoy* 400

15. ——— Costs refused to *negotiorum gestor* for a minor, having guardians, when the issue of such *negotiorum gestorum* was unfavourable to such minor. *Prince q.q. Dieleman* v. *Berrange, alias Anderson* 435

16. ——— Guardians entering into litigation concerning the property of minors, without the authority of the Court, are personally liable for costs, and cannot recover from minors if unsuccessful. *Ibid.*

COUNSEL—The Court is not precluded, by its 131st rule, from hearing two counsel, when the case is of such a nature as to make it expedient to do so. *Reis* v. *Executors of Gilloway* 186

CREDITOR—Not bound by any agreement respecting property in an extra-judicial separation between spouses. *Ziedeman* v. *Ziedeman* 238

2. ——— Creditors appointing trustees to an insolvent estate by deed held liable *pro ratâ* for the expenses of the trust. *Chiappini* v. *George* 303

———, NOTICE TO CREDITORS BY EXECUTORS: *See* EXECUTOR.

CRIMINAL PROSECUTION—By public prosecutor, no bar to a civil action by the injured party, but the injured party cannot prosecute both criminally and civilly, but must make his election. *Russouw* v. *Sturt* 378

2. ——— Misnomer in a criminal warrant is not fatal when a sufficient description is given. *King* v. *De Villiers* .. 292

CURATOR AD LITEM—Provisional sentence granted against a wife, married out of community, who had bound herself, without the assistance of a curator *ad litem*, as surety and co-principal debtor for her husband, on a bond *ex facie* for his benefit. *Nourse* v. *Steyn, Wife of Griffiths* 23

2. ——— Appointment of a curator *ad litem* to a wife, previous to the institution of an action for separation by her against her husband. *Rabie* v. *Rabie* 241

3. ——— Waiver of bad service of summons on an insane person by his curator *ad litem*. *In re Hartogh* 133

4. ——— Mode of proceeding for appointment of curator *ad litem*, and to have insanity declared. *Ziedeman, Ex parte Ziedeman* 525

CURATORS—Appointed to take charge of real property, the grantee being absent from the colony. *Orphan Chamber, N. O. Bohmer* v. *The Rev. Rushton and Wagner, as Pastors and Managers of the Roman Catholic Chapel* 547

DAMAGES—Awarded for harbouring a wife who had deserted her husband. *Le Roex* v. *Van Wyk* 253

2. ——— Damages for misconduct of attorney must be recovered by action, and not by motion. *Orphan Chamber* v. *Truter* 452

3. ——— An action for damages is the proper remedy for a breach of contract; such breach does not afford a defence to an action

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for the price of articles delivered under the contract. *Stiglingh* v. *De Villiers* 530

DAMAGES: *See* UNLIQUIDATED DAMAGES.

DATE—Where it was immediately proved in a provisional claim on a promissory note that the date of the note had been altered without the defendant's knowledge after it had come into the possession of the plaintiff, provisional sentence was refused. *Muller* v. *Langeveld* 94

——: *See* PROMISSORY NOTE.

DEBT: *See* ASSIGNATION.

DEBTOR—The co-principal debtor on a bond, who is also a surety, is released, notwithstanding that he is such co-principal debtor, from liability on the bond when the creditor has lost the special mortgage by non-registry of the bond. *Kotze* v. *Meyer* 466

2. —— All the joint owners of a property specially hypothecated by a bond must be summoned before the property can be declared executable, even though they may have renounced the exception "*duobus vel pluribus reis debendi*." *Lombard Bank* v. *Storm* .. 500

——: *See* NOTICE.

DECISORY OATH: *See* OATH.

DECLARATION—Alleging in the declaration that the cause of action arose "before the 1st day of December or thereabouts," evidence may be allowed as to what occurred during the whole of the said month of December. *Le Roex* v. *Van Wyk* 253

2. —— Notice of filing of declaration may be given in *Gazette* when defendant cannot be found, having gone away to avoid process. *Pfaff* v. *Schenck* 536

——, DOCUMENTS IN SCHEDULE TO DECLARATION: *See* SCHEDULE.

3. —— Of mother cannot bastardise her child. *Richter* v. *Wagenaar* 262

4. —— An unsworn declaration made before a notary, by a person intended to have been produced as a witness, but since deceased, is not admissible in evidence. *Jones* v. *Cannon* 379

5. —— On oath before a notary by a person on deathbed is not admissible in evidence. *Korsten* v. *Cuyler* 430

DEED—Execution of notarial deed decreed by the Court, after the marriage of the spouses, in terms of an ante-nuptial contract, not entitled to registration on account of non-witnessing. *Twentyman and another* v. *Hewitt* 156

——: *See* INDEMNITY.

DEFAULT of appearance is an admission by defendant of the capacity in which he is sued. *Burton, N. O.* v. *Vivier* 72

DELIVERY—An acknowledgment of the receipt of the purchase-price of goods "to be delivered" is sufficient to claim provisional sentence for the repayment of such price; the *onus probandi* the delivery being on the defendant. *Dreyer* v. *Roos* 34

2. ——.Where one Zastron, a general agent for Laing and for his (Zastron's) wife—to whom he was married out of community—ceded his wife's bond to Laing, and put it among Laing's

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separately kept papers in his (Zastron's) possession, *held* a sufficient delivery. *Laing* v. *Zastron's Executrix* 229

3. DELIVERY—Delivery is necessary to make effectual a special mortgage of moveables. *Smuts* v. *Stack, Vendue-Master, Van Reenen, & Karnspeck* 297

4. ———— The delivery of any instrument of debt having an act of cession endorsed theron, completes the assignation of the debt. *Ibid.*

5. ———— A bill of sale of moveables, without delivery, gives no *jus in re*, *Robertson* v. *Sequestrator* 349

6. ———— In a contract for the sale of wine, until delivery of the whole quantity is completed, purchaser is not *in mora* for not ascertaining the quality, but the *onus probandi* of quality, whether good or bad at time of delivery, rests with the purchaser. *Murray De* v. *Villiers* 366

7. ———— A *pignus mobilium* completed by tradition, and a *pignus prætorium* constituted by attachment, are preferent to a tacit general hypothec of prior date without tradition. *In re Woeke* .. 554

DENIAL OF SIGNATURE: *See* SIGNATURE.

DEPUTY SHERIFF: *See* SHERIFF.

DISHONOUR—Notice of dishonour of a promissory note is not provable by parole evidence in a provisional case. *Anderson* v. *Hutton & Woest* 75

2. ———— Notice of dishonour of a promissory note, must, if forwarded by post, be addressed to the right address of the indorser. *Mechau* v. *Van Jaarsveld* 113

DISSOLUTION OF PARTNERSHIP: *See* PARTNERSHIP.

DIVORCE—Action brought for divorce on the ground of adultery and malicious desertion, restricted to the latter. *Reeves* v. *Reeves* .. 244

2. ———— Decree granted against a wife of divorce *à vinculo matrimonii* after a decree of restitution of conjugal rights, to which obedience had been refused. *Mackay* v. *Mackay* 256

3. ———— Previous *stuprum* of the wife, unknown to the intended husband, does not give ground for an action for divorce. *Quære*—Whether in such case the marriage may be declared null *ab initio*. *Nel* v. *Nel* 274

4. ———— A decree of divorce for adultery granted notwithstanding variance between the description and the proof of the woman with whom the adultery was alleged to have been committed. *Gnade* v. *Gnade* 279

5. ———— Decree of divorce postponed for explanation of plaintiff's delay in bringing his action after his knowledge of his wife's adultery. *Wasserfall* v. *Wasserfall* 282

————: *See* MALICIOUS DESERTION.

————: *See* ADULTERY.

DOMICILE—Major Carter, previous to 1842, had come to this colony from India, had brought his family here, and had established them on a farm which he had bought. In the end of 1842, leaving his family here, he returned to India, solely for the purpose of receiving arrears of pay which had become due to him during the

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period of his leave, and of retiring from the service; and he intended immediately to return to this colony and settle here. He died shortly after his return to India, where letters of administration were granted to McKilligan. An executor dative was appointed in this colony. The decision of the case was given on another ground, but the Court held that at the time of Major Carter's death his proper domicile was in this colony, and, consequently, that claims against his estate might competently be made against his executor in this colony. *Sturt* v. *Carter's Executor* 57

2. DOMICILE—The interest of a wife married in community at the Cape of Good Hope, in a trust estate in personal property in England, must be regulated by the law of the Cape of Good Hope, as the matrimonial domicile, and such property falls into the community. *Pappe* v. *Home, Eagar & Co., & Bam's Executor* 212

3. ———— The domicile of the husband is the domicile of the wife, although she be personally absent from the place of the husband's residence. (Musgrave, J., diss.). *Bestandig* v. *Bestandig* (supporting *Barker* v. *Barker*, *Reeves* v. *Reeves*, and *Campbell* v. *Campbell*, 265, 244, 252) 280

DONATION—A donation made by a testator before his second marriage, and accepted by the donee, and, therefore, a debt actually existing against the joint estate during the marriage, but made payable after the testator's death, ceases with the dissolution of the marriage by his death to be a joint debt, and becomes chargeable on, and demandable from, his separate estate. *Reis* v. *Executors of Gilloway* 186

2. ———— Contracts between spouses, *stante matrimonio*, not constituting directly or indirectly a donation, are valid as far as regards themselves. *Ibid.*

3. ———— What is a *donatio remuneratoria*, as contradistinguished from *donatio inter vivos*, or *mortis causâ*. *Brink and others, Executors of Van der Byl* v. *Meyer* 552

4. ———— A *donatio remuneratoria* valid as between the parties without registration or execution before a notary. *Ibid.*

DRAWER: *See* BILL OF EXCHANGE.

EDICT—It is doubtful whether provisional sentence can be granted after an edictal summons, if there be no proof that the same had come to the defendant's notice. *Bergh, Trustee of Stoll* v. *Munro* 139

2. ——— Provisional sentence after an edictal citation granted on proof by affidavit that the same had come to the defendant's knowledge. *Dunell & Stanbridge* v. *Van der Plank* 140

EDUCATION: *See* CHILDREN.

ENDORSER: *See* PROMISSORY NOTE.

ERROR—Provisional sentence granted against the maker of a promissory note, who alleged an error in the date of the note. *Waters & Herron* v. *Roubaix* 42

2. ——— Provisional sentence given on a promissory note, notwithstanding an error of date appearing on the face of the document. *Kilian & Co.* v. *Tredoux* 51

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3. ERROR—An erroneous construction of a will allowed to be a ground for reopening a liquidation account. *Reis* v. *Executors of Gilloway* 186

4. ——— An error in a final sentence, apparent on the face of the record, corrected. *In re Richardson* 417

5. ——— in calculation of *kinderbewys* amount. *Prince q.q. Dieleman* v. *Berrange, alias Anderson* 435

6. ——— A judicial admission in error relieved against. *Ibid.*

———: *See* CESSION.

ESTOPPEL—A wife is not barred from claiming her legal rights on the dissolution of the marriage in community by the death of the husband, by any act of renunciation of such rights executed by her during the marriage. *Scorey* v. *Scorey's Executors* 231

EVIDENCE—Parole evidence is not admissible in a provisional case to negative proof of presentment of a bill of exchange given by production of a notarial protest for non-payment, in which protest presentment is alleged. *Hovil & Matthew* v. *Poultney* 14

2. ——— Notice to pay upon a bond provable in a provisional case by parole evidence or by affidavit. *Nederland's Executors* v. *Gnade* 18

3. ——— Parole evidence is not competent on provision to prove the dishonour of a bill of exchange. *De Ronde* v. *Zeiler* 61

4. ——— A judgment obtained against an office-holder for a deficiency in the accounts of his office, on his own admission, is no evidence to warrant provisional sentence for the amount of such deficiency against the party who had bound himself as security for any deficiency which might be caused by the default of such office-holder. *Sutherland* v. *Snell* 69

5. ——— Possession of a bond by one of two co-sureties, with an acknowledgment endorsed on the bond by the creditor that he had received payment of the whole from this one, not sufficient evidence of payment by such surety to entitle him to claim provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 71

6. ——— A writing across the face of a bill sued on provisionally, purporting to be a receipt of the amount from the plaintiff by the cashier of a bank, no evidence of payment by plaintiff. *Gie* v. *Villiers* 63

7. ——— Parole evidence refused on provision to show that the holder of the promissory note had become possessed of the note for a usurious consideration. *Muller* v. *Redelinghuys & Van Reenen* 41

8. ——— Evidence of signature may be given *instanter* when denied in a provisional case. *Dieterman* v. *Curlewis*; *Norden's Trustee* v. *Butler* 42, 52

9. ——— Parole evidence refused on provision to invalidate a promissory note, referring in its terms to an antecedent agreement, *ex facie* unconditional, by showing that such agreement was conditional and its conditions unfulfilled. *Keyter* v. *Viljoen* .. 44

10. ——— Extrinsic evidence not admissible on provision. *Fischer* v. *Daneel*; *Geert* v. *Van As*; *Norton* v. *Speck and another*; *Cloete* v. *Eksteen* 56, 62, 65, 71

11. ——— Evidence of dissolution of partnership given on provision. *Davis & Son* v. *McDonald & Sutherland* 86

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12. EVIDENCE—Parole evidence of the defence *non numeratæ pecuniæ* allowed to a provisional claim on a bond. *Bergh, N. O.*, v. *Krige & Bosman* 89

13. ———— Parole evidence may be competently received, on provision, as to the verity of a signature, and pursued until a doubt is raised as to such verity. *Still* v. *De Wet* 93

14. ———— Parole evidence may be received on a provisional claim on a promissory note, to show that the date of the promissory note had been altered without the defendant's knowledge after it had come into possession of the plaintiff. *Muller* v. *Langeveld* .. 94

15. ———— Where it was set up as a defence against a provisional claim on a promissory note that the plaintiffs, with other creditors, had entered into an agreement to give time to the defendant, on certain conditions, the plaintiff proposed to call evidence to shew that two of such other creditors had not signed, but was not allowed so to do by the Court. *Searight & Co.* v. *Lawton* 105

16. ———— A foreign instrument (*acte de naissance*) admitted as *primâ facie* proof of age. *Greef* v. *Verreaux* 151

17. ———— Documents which the plaintiff had obtained leave to add to his schedule annexed to his declaration, but which he had omitted to add, cannot be cited at the trial. *Reis* v. *Executors of Gilloway* 186

18. ———— Parole evidence inadmissible to prove the intention of the testator, there being, in the opinion of the Court, no ambiguity in the words of the codicil. *De Smidt* v. *Burton, Master of the Supreme Court* 222

19. ———— Where a declaration alleges a ground of action for divorce "before the 1st December or thereabouts," evidence may be allowed as to what occurred during the whole of the said month of December. *Le Roex* v. *Van Wyk* 253

20. ———— Unsupported evidence of the woman with whom the adultery was alleged to have been committed held insufficient *per se* to prove the adultery. *Weyers* v. *Stopforth* 273

21. ———— A declaration made before a notary by a person, since dead, and not sworn to, not admissible. *Jones* v. *Cannon* 379

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23. ———— It is no evidence of the actual granting of a power of attorney that such power is referred to in a bond. *Lombard Bank* v. *Hammes* 524

24. ———— Oath of party about leaving the colony, refused to be taken by the Court under the circumstances of the case, before pleadings closed. *Borradailes q.q. Kenny* v. *Maynier* 525

EXCEPTION—To the declaration in an action for divorce, on the ground of *stuprum* previous to the marriage; allowed. *Nel* v. *Nel* 274

2. ———— *Exceptio declinatoria fori* (non-jurisdiction), may be founded on some fact alleged in the declaration or admitted by the plaintiff. An action brought against the writer and publisher of a certain work entitled "Researches in South Africa," by a colonial landdrost or magistrate, for defamatory statements therein made; the defendant pleaded this exception on the ground that the grievances complained of were committed in England. This

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the plaintiff's declaration denied. The exception was accordingly overruled. *Mackay* v. *Philip* 455

3. EXCEPTION—Notwithstanding the renunciation of the exception *duobus vel pluribus reis debendi*, joint owners of property hypothecated must all be summoned before such property can be declared executable. *Lombard Bank* v. *Storm* 500

4. ———— The exception, *rei judicatæ vel litis finitæ*, is no bar to an action, the cause of action not being the same. *Meyer* v. *Carlisle, Campbell, and others* 540

———— Of Non-Excussion: *See* Excussion.

———— Of Non-qualification: *See* Non-qualification.

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2. ———— The renunciation of the *beneficium excussionis* by a surety makes him at once liable, although real property of the principal debtor, specially mortgaged in security, has not been excussed. *Hare q.q.* v. *Croeser* 293

3. ———— A deficiency on the face of the liquidation account of the principal debtor's estate, confirmed by sentence of the Court and a certificate from the sequestrator that there is no other property in the estate, is sufficient excussion, although such sentence be under appeal at the instance of the creditors. *Ibid.*

4. ———— The effect of the renunciation of the benefit of excussion by an *achterborg* (rear surety), is destroyed by a clause to pay if the debtor is unable. *Muller* v. *Meyer* 302

5. ———— A surety, under renunciation of the *beneficia*, and special hypothec, is not entitled to claim previous excussion of the hypothec; this privilege belonging only to "simple" sureties; but he may in execution point out goods of debtor. *Serrurier* v. *Langeveld*; *Chase* v. *Cloete*; *Brink* v. *Anosi* 316

EXECUTION—A warrant of execution signed by a resident magistrate is not sufficient to sustain provisional sentences in the Supreme Court, on a judgment obtained in the resident magistrate's Court. The record or an office copy of the judgment must be produced. *De Villiers* v. *Cruywagen* 28

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EXECUTOR—Where the defendant, as executor, had given notice to creditors to lodge claims, in terms of the 30th section of Ordinance No. 104, the plaintiff, who had lodged his claim, was held entitled to claim payment of his bond without giving the usual legal notice stipulated for in the bond. *Southey* v. *Borcherds, Executor of Dormehl* 22

2. ———— Notice to pay up bond must be given on the death of the debtor. *Smuts* v. *Executors of Haupt* 70

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4. EXECUTOR—Non-lodgment of a claim, in the estate of a deceased person, when specially called upon by the executor, no bar to the creditor claiming from the executor, still having assets. *Horn* v. *Loedolff et Uxor* .. : 403

5. ———— *Plene administravit* a good defence to an action by a creditor who had not lodged his claim in time. *Brink* v. *Esterhuyzen* 473

6. ———— A claim may be made against an executor dative in this colony for a debt already claimed against an executor of the same estate in India. *Sturt* v. *Carter's Executor* 57

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2. ———— Whether a defendant is entitled to refer to the plaintiff's oath to prove the nullity of the debt as being a gambling transaction, in a provisional claim on a bill of exchange. The Court being equally divided in opinion, no judgment was given. *Ibid.*

GAOL—Personal service on a debtor confined in gaol is good. *Landsberg* v. *Hendriks* 136

GAZETTE—Notice of filing of declaration may be given in *Gazette* when defendant cannot be found, having gone away to avoid process. *Pfaff* v. *Schenck* 536

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4. ———— Provisional sentence refused on a good-for, sued on by executors, on account of antiquity and other circumstances (viz., that no claim had been made by the deceased creditor in his lifetime, although the debtor's immoveable property had been sold expressly for payment of his debts, which had been called in by advertisement in the *Gazette*). *Schiller*, v. *Executor of Cloete Horak* 28

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3. ———— Costs of suit given against the Government. *Ibid.*

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GRACE—Days of. There are no days of grace in this colony. *Trustees of Randall* v. *Haupt* 79

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2. ———— Consent of husband is necessary to create a debt which shall be valid against the wife's share of the common estate after her death. *Executors of Morkel* v. *Heirs of Morkel* 177

3. ———— Consent of husband necessary to bind as surety, his wife married in community of property. *Ibid.*

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an action commenced against her; but this rule not subsequently made absolute in the particular case. *Gray* v. *Spengler* 201

5. HUSBAND—Where an action is brought against the husband in respect of payment of money to the wife, it is necessary to allege that the wife received the money by the order and consent of the husband. *Brath* v. *Mulder* 207

6. ———— Cession by a husband, married out of community, of a bond, the separate property of his wife, by virtue of a general power from her in his favour, held good, independently of the circumstance that the wife had not, in the ante-nuptial contract, reserved to herself the administration of her separate property. *Laing* v. *Zastron's Executrix* 229

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2. ———— The legal hypothec enjoyed by the Government of this Colony upon the property of collectors of the revenue is not diminished or impaired by Government taking security from such collectors. *In re Insolvent Estate of Buissinne* 318

3. ———— Such legal hypothec of Government commences from the date of appointment of collectors, and not from date of default. *In re Insolvent Estate of Buissinne* 330

4. ———— A general hypothec is not lost by the discharge of the special hypothec. *In re Blanckenberg* 477

5. ———— Prior general hypothec preferent to a posterior special hypothec of moveables of which no delivery has been made. *In re Russouw* 479

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7. ———— The hypothec of landlords on *invecta et illata* preferable without attachment, as to property actually remaining in the landlord's house, to *pignus prætorium*, (*i. e.*, judicial arrest by the messenger of the magistrate's court). *In re Stilwell* 537

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INDEMNITY—A surety to a bond who, having paid the debt due by the principal debtor, had obtained cession of the bond from the creditor, cannot sue provisionally on a deed of indemnity granted by the defendant, holding him, the surety, harmless in case of such payment, the payment being incapable of proof without evidence extrinsic of the deed of indemnity. *Cloete* v. *Eksteen* .. 71

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2. ———— Action for injury brought by one passenger, a foreigner, against the other, also a foreigner, at the Cape (no objection, however, was raised as to the jurisdiction). *Ibid.*

3. ———— It is not actionable for the drawer of a promissory note to say to the holder, on its presentation, "that the whole of said note had long ago been paid, and that he owed the holder nothing," the fact being that Rds. 300 were still due. *Ruthven* v. *Poggenpoel* 380

4. ———— It is not actionable to speak the following words *in rixa* (*i.e.*, in brawl): "Damned informer, damned rascal, damned vagabond, damned broken-nosed informer," compensated by return of "liar," and shaking fist in face. *Powel and her Husband* v. *Price* 500

5. ———— The words, *jouw gemeene bliksem, jouw bliksemche smeerlap* (the literal meaning of which is, "You common lightning, you lightning dirty rag;" but in the sense in which they are commonly used in this colony mean "you low rascal, you rascally blackguard") held by the majority of the court (Menzies, J., *diss.*) not actionable. *Wolff* v. *Van Hellings* 529

INSANITY—Mode of proceeding to have a person declared insane, and a curator *ad litem* appointed. *Ziedeman, Ex parte Ziedeman* .. 525

INSOLVENCY—The sequestration of an estate of which the executor had passed a promissory note, no bar to provisional sentence against the executor on such note. *Ross and others* v. *Muntingh* 39

2. ———— Provisional sentence granted on a promissory note, given by an insolvent after sequestration (under the Ordinance No. 64); for a new debt contracted subsequently to such sequestration. Execution cannot, however, take place against his property while under sequestration, nor, probably, would civil imprisonment be issued against his person until the stage of the sequestration at which the creditors under the sequestration might obtain a decree of civil imprisonment. *Norden* v. *Magadas* 45

3. ———— The insolvency of the acceptor of a bill of exchange before the day of payment does not obviate the necessity of presentment for payment, to entitle the holder to recover from drawer. *Thomson & Co.* v. *Archer* 61

4. ———— The insolvency of the holder, who was the payee, of a bill of exchange, after the drawing of the bill, *held*, notwithstanding his subsequent rehabilitation, a good defence against a provisional claim on the bill; no assignment having been made to him by his creditors under the sequestration. *Barry* v. *Bailey* 83

5. ———— Assignment by an uncertificated insolvent, of property acquired after insolvency, held good. *In re Insolvent Estate of Van As* 339

6. ———— Uncertificated insolvent's estate entitled to property acquired after insolvency. *Ibid.*

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9. ———— Appeal by insolvent, whose estate is under sequestration, incompetent. *In re Richardson* 417

10. ———— Transaction *in fraudem creditorum* cannot be challenged by the insolvent, but only by his creditors. *In re Richardson* 424

11. ———— Landed property not realising at public sale the amount of the mortgage, and left unsold at the instance of the mortgagee, the debt or liability of the insolvent mortgagor is not thereby destroyed. *In re Theron* 508

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INSURANCE—MARINE—Contract of insurance completed by agreement and drawing out of policy, and giving credit for premium. *Hollet* v. *Nisbet & Dickson* 391

2. ———— The insurer has a lien on the undelivered policy in his possession, until payment of the premium. *Ibid.*

INTERDICT—Applied for by a wife, married out of community, restraining her husband from disposing of her separate property. *Mulder* v. *Mulder* 251

2. ———— Granted to a husband against a person harbouring his wife. *Le Roex* v. *Van Wyk* 253

INTEREST—Although interest is stipulated for at a certain rate per annum on a mortgage bond, with no prescribed term of payment, payment of the bond is exigible within a year of the date of execution of the bond, where by a clause in the bond the contingency of its being called in before the expiration of a year is contemplated. *Busk* v. *Cloete* 15

2. ———— Where it is stipulated in a mortgage bond that three months' notice shall be given calling in the bond, and, further, that unless the interest be paid on the day on which it falls due, the principal and interest shall be considered as due without notice, provisional sentence will, on non-payment of the interest, be given for capital and interest where there has been no notice calling in the bond, or demand by plaintiff for the interest; notwithstanding the bond also contains the usual clause requiring such notice. A tender of the interest only, insufficient. *Faure* v. *Wright* 21

3. ———— Where, in the terms of a mutual will, made by two persons married in community, the survivor was entitled to the usufruct of the inheritance of a minor child, under the burden of maintaining and educating the minor, and the mother, surviving, had for some years allowed the interest of the minor's inheritance, except a small annual amount for his maintenance, to accumulate in the hands of the Master of the Supreme Court, as guardian of the minor, who at the same time administered his property, the Court held that the plaintiff, who had married the widow in community, and who had also for several years after his marriage with her allowed the interest to accumulate as before, was entitled to bring an action for the recovery of the interest accumulated, both before and after his marriage, as being property of the community. *De Smidt* v. *Burton, Master of the Supreme Court* 222

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JUDGMENT—Provisional sentence may be claimed in the Supreme Court on a judgment obtained in an inferior Court, a defendant being called upon in the summons to confess or deny such judgment and the validity of the debt, even if that judgment has been attempted to be put in execution. The record or an office copy of the judgment must be produced, the warrant of execution signed by the magistrate being insufficient. *De Villiers* v. *Cruywagen* 28

2. ———— A judgment against two late co-partners, paid by one of them, gives no right to provisional sentence in favour of that one against the other for any amount, the partnership accounts being yet unsettled. *McDonald* v. *Sutherland* 91

3. ———— Is not necessary to serve on a defendant the record or an office copy of any judgment of the Supreme or Circuit Courts. *A.* v. *B.* 118

4. ———— Provisional sentence refused on judgment of an inferior Court where it was not stated in the summons in which inferior Court the judgment had been obtained. *Malan* v. *Theron* 123

5. ———— A judgment for the restitution of conjugal rights sufficient proof of marriage in a subsequent action for divorce on the ground of malicious desertion. *Van Blerk* v. *Naude* 257

6. ———— Copy of judgment must be served on defendant, in an application for civil imprisonment, as well as a copy of the writ and sheriff's return of *nulla bona*. *Wolff* v. *De Villiers* .. 24

7. ———— A judgment obtained against an office-holder for a deficiency in the accounts of his office, on his own admission made in an action to which his surety was no party, is no evidence to warrant provisional sentence for the amount of such deficiency against the surety who had bound himself as security for any deficiency which might be caused by the default of such office-holder. *Sutherland* v. *Snell* 69

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9. ———— *Exceptio rei judicatæ*, or *litis finitæ*, founded on a previous criminal prosecution, no answer to a civil action for an assault. *Russouw* v. *Sturt* 378

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KUSTING BRIEVEN—And also special conventional mortgages for purchase-money, or money lent for payment of purchase-money, or mortgage taken over when constituted *simul et semel* at the time of the transfer of the property mortgaged, are privileged, and preferent to prior tacit or legal hypothecs, and this without being necessarily inserted in the deed of transfer itself. *In re Insolvent Estate of Buissinne* 318

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2. ——— Provisional sentence granted on an underhand contract of lease. The lessor need not prove the lessee's possession under the contract, as it is presumed until repudiated. *Truter* v. *Everest* .. 32

3. ——— The allegation of unliquidated damages for want of repairs is no defence to provisional claim for rent on a lease; unless the defendant lessee can make out a *primâ facie* case to the satisfaction of the Court, that in the principal case he might be able to prove damages to a certain amount; but proof that the repairs require a certain amount of money to be expended on them is no necessary test that the defendant has sustained a corresponding amount of damage by failure to repair. *Vowe* v. *Pedder* 33

4. ——— Minority held a sufficient defence (without the allegation of the lesion of the minor by the transaction, Menzies, J., *diss.*) against a provisional claim on a lease entered into by a minor, with the assistance of his mother, not his legal guardian. *Gantz* v. *Wagenaar* 92

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3. ——————— The unconfirmed liquidation account in an insolvent estate is not a final sentence, although framed in terms of an order of Court setting aside a former account. *Nisbet & Dickson* v. *Richardson* 298

4. ——————— Civil imprisonment stayed in consequence of the above finding. *Ibid.*

4. ——————— Signing a liquidation account in a minor's estate makes an administering tutor. *Niekerk* v. *Niekerk* 452

5. ——————— The confirmation of a liquidation account has the effect of a decree in favour of the creditor for the debt for which he had been ranked; and where the liquidation account awards him nothing in respect of such debt, he is entitled to attach and take in execution, for his own behoof, any property of his debtor by law attachable and executable and acquired by the debtor subsequently to the date of the sequestration. *Storm* v. *Breda & De Lima* 476

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5. ——— Parent's consent is necessary in a promise of marriage by a minor *subsequente copulâ*, although the minor be emancipated, and it makes no difference in the principle that the defendant, who was a minor when the pleadings closed and the trial terminated, became, by alteration of statute, a major before judgment was given. *Ibid.*

6. ——— But if the action had been brought against defendant after majority, he probably would not have been entitled to found a defence on his minority at the date of the contract under the circumstances of this case. *Ibid.*

7. ——— A widow, although remarried (out of community of property and with exclusion of the *jus mariti*) to a second husband, held incompetent (on application by her second husband) to appear in Court to confess judgment for the amount of a *kinderbewys* executed before the second marriage, by which the paternal portions of the children of the first marriage had been ascertained. *Prince q.q. Dieleman* v. *Anderson and others* .. 176

8. ——— On dissolution of marriage in community by death of husband, the wife is not barred from claiming her legal rights by any act of renunciation of such rights executed by her during the marriage. *Scorey* v. *Scorey's Executors* 231

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10. MARRIAGE—Where a marriage was contracted in Ireland, the certificate of the rector, whose handwriting was affirmed by a witness, who also knew the spouses and that they lived together as such, although not himself present at the marriage, held sufficient proof of the marriage. *Ibid.*

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5. ——— *Negotiorum gestor* for minors, having guardians, not entitled to costs when the issue of the *negotiorum gestorum* has been unfavourable to such minors. *Prince q.q. Dieleman* v. *Berrange, alias Anderson* 435

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3. ——— Where it is stipulated in a mortgage bond that three months' notice shall be given calling in a bond, and further, that unless the interest be paid on the day on which it falls due, the principal and interest shall be considered as due without notice, provisional sentence will, on non-payment of the interest, be given for capital and interest, where there has been no notice calling in the bond, or demand by plaintiff for the interest. *Faure* v. *Wright* 21

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16. ——— Provisional sentence refused against the defendant who had written his signature below the word "accepted" across a promissory note, although the maker of the note had first been excussed. *Brink* v. *Minnaar* 76

17. ——— Provisional sentence refused against a defendant who, not being a party to a promissory note, signed his name at the back of the note. Such signature creates no liquid liability, either as indorser or surety, and the liability (if any) must be established in the principal case. *Norton* v. *Satchwell* 77

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22. ——— There are no days of grace for presentment of a promissory note in this colony. *Ibid.*

23. ——— A promissory note payable at sight "or as soon as a bill of exchange" (referred to in the note), "can be discounted," is an illiquid document. Provisional sentence refused. *Norden* v. *Cauvin* 80

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31. ——— It is a good defence against a provisional claim on a promissory note, that the plaintiffs, with other creditors, had entered into an agreement to give time to the defendant on certain conditions. *Searight & Co.* v. *Lawton*; *Dickson, Burnie, & Co.* v. *Lawton*; *Borradailes & Co.* v. *Lawton* 105, 109, 110

32. ——— It is a good defence against the indorsees of a promissory note that the note had been indorsed by the payee long after it was due, the circumstances being such as not to entitle the payee to provisional sentence, namely, the arrest and

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5. ——— On a bill of exchange, the presentment of which was denied. The allegation of presentment contained in a notarial protest cannot be negatived on provision by parol evidence. *Hovil & Mathew* v. *Poultney* 14

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10. ——— Upon a bond in which reference was made to a collateral document, as showing the consideration thereof, without such collateral document being produced or founded on in claiming provision. *Thom* v. *Thom* 19

11. ——— Upon a bond where the creditor had given no notice but the debtor had given the legal notice that he would pay up his bond to the creditor. The creditor is entitled, in default of such payment by the debtor, to claim payment without giving notice calling in the bond, the legal effect of the usual clause in the bond as to notice being that either party may give such notice. *Krynaauw* v. *Gildenhuysen* 20

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13. ——— Upon a bond without notice calling it up, where it is stipulated in a mortgage bond that three months' notice shall be given calling up the bond, and further that unless the interest be paid on the day on which it falls due, the principal and interest shall be considered as due without notice, provisional sentence will, on non-payment of the interest, be given for capital and interest, where there has been no notice calling in the bond or demand by plaintiff for the interest. A tender of the interest only is insufficient. *Faure* v. *Wright* .. 21

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record or an office copy must be produced; the warrant of execution signed by resident magistrate is not sufficient. *De Villiers* v. *Cruywagen* 28

20. PROVISIONAL SENTENCE—GRANTED—On the judgment of a Court of resident magistrates, where the defendant pleaded that his defence had been improperly overruled below, but, on reference to the record, the Court found this was not the case, otherwise provision would have been refused. *Greig* v. *De Lima* 29

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28. ——— On a promissory note, payment of which was first demanded four years after it was due. *Reitz* v. *Kock* 38

29. ——— On a promissory note against an executor, the maker, although the estate was subsequently surrendered as insolvent. *Ross and others* v. *Muntingh* .. 39

30. ——— On a promissory note, where the consideration of the note was alleged to be usurious. *Rens* v. *Horak* 40

31. ——— On a promissory note, containing a penal stipulation, for the amount of the note, although not for the penalty, inasmuch as the plaintiff's damages, in respect of the latter, could not be liquidly ascertained. *Steytler* v. *Smuts* 40

32. ——— Against the maker and indorser in blank of a promissory note, notwithstanding proof tendered on their part that the holder had become possessed of the note for a usurious consideration, such proof not being receivable on provision. *Muller* v. *Redelinghuys & Van Reenen* .. 41

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35. PROVISIONAL SENTENCE—GRANTED—On a promissory note not expressing any *causa debiti*. *Low* v. *Oberholzer* 43

36. ——— With double costs, as a penalty for denial of signature, in a provisional claim. *Deneys* v. *Daniel* 44

37. ——— On a promissory note, referring in its terms to an antecedent agreement, *ex facie* unconditional, parol evidence being held inadmissible to invalidate the note by shewing that such agreement was conditional, and its conditions unfulfilled. *Keyter* v. *Viljoen* 44

38. ——— On a promissory note given by an insolvent, after sequestration (under the Ordinance No. 64), for a new debt contracted subsequently to such sequestration. *Norden* v. *Magadas* 45

39. ——— On two promissory notes for £70 each, given at the same time for coals sold, although the coals on one note alone had been delivered, and those on the other rejected as bad; the Plaintiff denying the defendant's right to reject, and defendant not being able to prove his right by production of liquid proof *instanter* *Collison & Co.* v. *Eksteen* 46

40. ——— Against the maker of a promissory note, notwithstanding an allegation of payment to the payee, after the note became due, though the note was not presented by the holder to the maker until long overdue. *Levicks & Sherman* v. *Eksteen* 49

41. ——— On a promissory note, where the signature had been previously denied, and the plaintiff had then failed to prove the same; but refused for the costs to which the plaintiff was put by such denial. *Birkwood* v. *Van Rooyen* .. 50

42. ——— On a promissory note, notwithstanding an error of date appearing on the face of the document. *Kilian & Co.* v. *Tredoux* 51

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45. ——— Against the indorser of a bill of exchange, without allegation in the summons that the bill had been presented to the acceptor, and that payment had been refused. *Rens* v. *Ven der Poel and another* 122

46. ——— Where the defendant was described in the summons Jan C. Heydenryck, although "C." is not in itself a name [Wylde, C.J., *diss.*], the defendant not appearing to make objection. *Rens* v. *Heydenryck* 124

47. ——— On a bond the amount of which was to be paid at certain stipulated periods, and on failure of such payment the whole amount of the bond to be claimable, without allegation in the summons that the defendant had made default in the payment of the instalments. *Muller* v. *De Kock* .. 125

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48. PROVISIONAL SENTENCE—GRANTED—Where a note was sued upon by "Thomas Hudson, assistant cashier of the Cape of Good Hope Bank," the capacity being merely descriptive, and therefore not founding any objection of non-qualification. *Hudson* v. *Cozens* 126

49. ——— After an edictal citation, on proof by affidavit that the same had come to the defendant's knowledge. *Dunell & Stanbridge* v. *Van der Plank* 140

50. ——— On an attorney's taxed bill of costs. *Commissioner for the Sequestrator* v. *Vos* 286

51. ——— ——— Notwithstanding an objection that the plaintiff had not paid the costs of previous proceedings in the same case, it appearing that such costs had not been taxed and demanded. *Deneys* v. *Stoffberg* 301

52. ——— On a bond containing a special hypothec against surety who had renounced the *beneficia*, and who had, in answer to the provisional claim, claimed the excussion of the hypothec; this privilege belonging only to simple sureties. But such surety may in execution point out goods of debtor. *Serrurier* v. *Langeveld*; *Chase* v. *Cloete*; *Brink* v. *Anosi* 316

53. ——— Where *causa debiti* which was alleged to be false was not shewn to be so. *Hare q.q.* v. *Bird and others* 331

54. ——— Against a surety also bound as co-principal debtor, who had renounced the benefit of excussion, it being no defence that the creditor had refused to take a bond from him and cede the debt or to discuss the principal debtor. This is the privilege of only simple sureties. *Overbeek* v. *Cloete* 523

55. ——— On a bond executed in favour of a mandatary [agent], "or his administrators," which bond was sued upon by administrator of the mandatary after the death of the mandatary. *De Waal, Executrix of Rowles* v. *N. E. Mostert* 534

56. ——— ——— REFUSED—On a banker's cheque, because it contained no acknowledgment nor *primâ facie* evidence of a debt by the drawer to the drawee, nor that the plaintiff, the indorsee, was an onerous indorsee. *Berrange* v. *De Villiers*. (*Sed vide Rens* v. *Smith*, p. 13) 12

57. ——— On "good-fors," where their antiquity (thirteen to sixteen years), was coupled with the fact that no claim having been made by the deceased creditor in his lifetime, although the debtor's immovable property had been sold expressly for payment of his debts, which had been called in by advertisement in the *Gazette*. *Schiller, Executor of Cloete* v. *Horak* 28

58. ——— ——— On an account-current, rendered by a commission agent of his commission sales, shewing a balance in favour of his principal. Such account cannot be sued upon provisionally against such agent inasmuch as, not having received a *del credere* commission, he is not bound to guarantee the debts of the purchasers mentioned in such account. *Smith* v. *Southey* 53

59. ——— On account sales rendered by a consignee, it not being a document sufficiently liquid for provisional sentence. *Trimbey* v. *Harris* 54

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60. PROVISIONAL SENTENCE—REFUSED—On an acknowledgment of a balance due to a third person, which is not a negotiable instrument without cession. *Reitz* v. *Kock* 56

61. ——— On an acknowledgment of the purchase of goods which *ex facie* of the documents are to be delivered only under certain circumstances, the proof of which must be extrinsic, coupled with a promise of payment. *Fischer* v. *Daneel* 56

62. ——— On an acknowledgment of a debt with a promise of payment on a contingency which has not necessarily occurred. *Sturt* v. *Carter's Executor* 57

63. ——— On a document wherein the defendant admitted having stolen the amount claimed by the plaintiffs. *Barry & Co.* v. *Manuel* 58

64. ——— On an attorney's bill of costs, where it did not appear that the same had been taxed in the presence of the party, or after due notice given to him of taxation. *De Wet* v. *Meyer* 59

65. ——— At the suit of an attorney against his client, the plaintiff in a previous action, on a taxed bill for costs in that action, which the defendant therein had been condemned, but had failed to pay. Separate notice to his own client to attend taxation is necessary. *Dickson* v. *Gildenhuys* .. 60

66. ——— For want of proof of presentment for payment to the acceptor, in a provisional claim against the drawer of a bill of exchange, such presentment being necessary, although the acceptor became insolvent before the bill was due. *Thomson & Co.* v. *Archer* 61

67. ——— On a bill of exchange, the only evidence offered of its dishonour being parol evidence, which is inadmissible for the purpose. *De Ronde* v. *Zeiler* 61

68. ——— Against the acceptor of a bill of exchange payable at a particular place, because presentment at such place was not duly alleged in the summons and proved. *Simpson Brothers & Co.* v. *Allingham* 62

69. ——— On a bill or order, payable on a contingency, respecting which extrinsic proof would be required. *Geert* v. *Van As* 62

70. ——— Against the drawer of a bill of exchange, who is not provisionally liable to the acceptor, who had paid the bill, since such payment may have been made out of the drawer's own funds. *Norden* v. *Stephenson* 63

71. ——— Against a joint acceptor of a bill of exchange, at the suit of another joint acceptor who had the bill in his possession and on it an acknowledgment from the holder that the amount had been received from him. Such possession and acknowledgment does not afford such presumption of payment by the plaintiff as to entitle him to sue the other joint acceptors provisionally for their shares. *Gie* v. *De Villiers* .. 63

72. ——— Against one of the drawees of a bill of exchange, of whose acceptance, alleged to be by mark, no evidence appeared *ex facie* of the document. *Carstens* v. *Hendricks* 64

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73. PROVISIONAL SENTENCE—REFUSED—On a bill of exchange payable on a contingency requiring extrinsic proof. *Norton* v. *Speck and another* 65

74. ——— Against the drawer of a bill of exchange where the summons did not allege presentment to the acceptor. *Ibid.*

75. ——— Against the drawer of a bill of exchange, payable after sight, in respect that there was no protest alleging presentment for acceptance or sight, to the drawee, though a protest for non-payment was produced. *Phillips & King* v. *Ridwood* 66

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77. ——— On a bond in which the debtor bound himself not to pay but "*te verrekenen*," or "reckon for," a certain sum with his creditor, that not being a liquid document. *Jones* v. *Dusing* 68

78. ——— On a judgment obtained against an office-holder for a deficiency in the accounts of his office, on his own admission made in an action to which his surety was no party, such judgment being no evidence to warrant provisional sentence, for the amount of such deficiency, against the surety. *Sutherland* v. *Snell* 69

79. ——— On a bond referring to the balance of an account current as the *causa debiti*, the said account current, on production, not shewing any debt due. *Meyer* v. *Goek* 69

80. ——— On a deed of indemnity given by a principal debtor on a bond to the surety to the bond, who had paid the debt due by the principal debtor and obtained cession of the bond, such deed holding the surety harmless in case of such payment, the payment being incapable of proof without evidence extrinsic of the deed of indemnity. *Cloete* v. *Eksteen* 71

81. ——— Against a co-surety on a mortgage bond, where the plaintiff founded on his possession of the bond, with an acknowledgment endorsed on such bond by the creditor that he had received payment of the whole from the plaintiff; this not being evidence of payment by such surety to entitle him to claim provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 71

2. ——— Against the defendant; who was summoned on a bond, as married in community to the widow, who had been married in community to the original debtor on the bond; on the ground that although the defendant's default was an admission that he was the husband of the former widow and had married her in community of property, and although the bond proved a debt owed formerly by the widow's first husband, and now by his representatives, the plaintiff did not prove the widow's marriage to her first husband and that such marriage was in community. *Burton N. O.*, v. *Vivier* .. 72

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86. ——— On a promissory note, where the only proof of the notice of dishonour tendered was by affidavit. *Anderson* v. *Hutton & Woest* 75

87. ——— Against the defendant, who had written his signature below the word "accepted" across a promissory note, although the maker of the note had first been excussed. *Brink* v. *Minnaar* 76

88. ——— Against a defendant who, not being a party to a promissory note, signed his name at the back of the note, such signature creating no liquid liability either as indorser or surety. Such liability must be established in the principal case. *Norton* v. *Satchwell* 77

89. ——— Against a defendant who had written across the face of a promissory note "accepted," and signed his name below it, such signature creating no liquid liability. *De Kock* v. *Russouw and Van der Poel* 78

90. ——— Where a promissory note was made payable in a certain time after notice, and the proof of such notice tendered was a mere memorandum that the notice had been given, purporting to have been written by a notary public on the note. Such memorandum not being a notarial act does not prove itself, but an affidavit supporting it is required. *Verster* v. *O'Reilly* 78

91. ——— Where the only proof tendered of the indorser's waiver of due negotiation was by affidavit. *Trustees of Randall* v. *Haupt* 79

92. ——— Where presentment of a promissory note was made on the third day after that on which the note became due, this not being due negotiation in a question with the indorser. *Ibid.*

93. ——— On a promissory note payable at sight or "as soon as a bill of exchange" (referred to in the note) "can be discounted." Such a document is an illiquid one. *Norden* v. *Cauvin* 80

94. ——— On a bill of exchange, on the ground that the estate of the holder, who was also the payee, had, after the drawing of the bill, been sequestrated as insolvent, and that, although since rehabilitated, no assignment to the plaintiff had been made by the creditors under the sequestration. *Barry* v. *Bailey* 83

95. ——— Against two late partners, on a bill purporting to be drawn by the partnership, but drawn by one partner only after dissolution. *Davis & Son* v. *McDonald & Sutherland* 86

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97. PROVISIONAL SENTENCE—REFUSED—For the first instalment (under conditions of sale) of landed property purchased at public auction, the defendant, who held a mortgage bond for the property, having offered to allow the amount of such bond in compensation of the sum claimed. *Eaton, N. O.*, v. *Johnstone* 90

98. ——— Against one of two late co-partners, on a judgment against both, paid by the other of them; the partnership accounts being still unsettled. *McDonald* v. *Sutherland* 91

99. ——— On a judgment of an inferior Court, which was found by the Court to be of such a nature that it would be set aside on review. *Thorley* v. *De Lima* 91

100. ——— On a lease entered into by a minor with the assistance of his mother not his legal guardian, and this without the allegation of the lesion of the minor by the transaction (Menzies, J., *diss.*). *Gantz* v. *Wagenaar* 92

101. ——— The verity of the signature of the document having been rendered doubtful by parole evidence. *Still* v. *De Wet* 93

102. ——— On the ground of the antiquity (nine years) of the document sued on, coupled with other circumstances. *Koemans* v. *Van der Watt* 93

103. ——— On the ground that the date of the promissory note sued on had been altered without the defendant's knowledge, after it had come into the possession of the plaintiff. Parol evidence may be received on provision to prove such alteration. *Muller* v. *Langeveld* 94

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105. ——— On a promissory note on the ground of *novatio debiti*, where the payee had entered into a written engagement to wait for payment until a certain contingency. *Cannon* v. *Ford* 95

106. ——— On a promissory note on the ground that the payee who had endorsed the note was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. *Smith* v. *Campbell* 96

107. ——— On a promissory note on account of circumstances entitling the maker of the note to the same defence against indorsees as against the payee, namely, first, submission to arbitration between maker and payee, and second, no value given by plaintiff until after the date due. *Hovil & Mathew* v. *Wood* 97

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109. ——— On a promissory note in answer to a claim by the payee, on the ground that other securities had been given in payment by the maker and accepted by the payee, which securities were of such a character as could be immediately sued upon by the payee, and some of which securities had already been released by him to an amount larger than that of the note sued upon. *Sutherland* v. *Elliott Brothers* 99

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19. ——— It is not necessary, in a summons on a bond for a certain amount payable in certain instalments, on failure to pay which at the stipulated periods the whole sum was to become payable at once, to allege specially that the defendant had made default in the payment of the instalments. *Muller* v. *De Kock* 125

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22. ——— Capacity appended to the plaintiff's name (e.g. Thomas Hudson, assistant cashier of the Cape of Good Hope Bank) in the summons is merely descriptive. *Hudson* v. *Cozens* 126

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3. ———— A judgment obtained against an office-holder for a deficiency in the accounts of his office, on his own admission, made in an action to which his surety was no party, is no evidence to warrant provisional sentence for the amount of such deficiency against the party who had bound himself as security for any deficiency which might be caused by the default of such office-holder. *Sutherland* v. *Snell* 69

4. ———— A surety to a bond who, having paid the debt due by the principal debtor, had obtained cession of the bond from the creditor, cannot sue provisionally on a deed of indemnity by the defendant holding him, the surety, harmless, in case of payment, for whatever sum he might have to pay, the payment being incapable of proof without evidence extrinsic of the deed of indemnity, and this, although the summons alleged the payment of the specified amount on account. *Cloete* v. *Eksteen* 71

5. ———— Possession of a bond by one of two co-sureties with an acknowledgment indorsed on the bond by the creditor that he had received payment of the whole from this one, is not sufficient evidence of payment by such surety to entitle him to claim provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 71

6. ———— The signature of a third party, not being a party to a promissory note, at the back of the note, creates no liquid liability either as indorser or surety; such liability must be established in the principal case. *Norton* v. *Satchwell* 77

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8. ———— A wife married in community cannot be bound as a surety without her husband's consent. *Executors of Morkel* v. *Heirs of Morkel* 177

9. ———— Surviving widow who had not, on the death of her husband, duly repudiated or abandoned her interest in the joint estate (even though there was nothing to abandon), held liable, when she subsequently acquired property of her own, for one-half the amount of a suretyship for which her husband became liable during the marriage. *Brink* v. *Louw, Widow of Niekerk* 210

10. ———— Effect of renunciation of the benefit of excussion, by rear-surety ("*achterborg*"), destroyed by a clause to pay, if debtor is unable to pay. *Muller* v. *Meyer* 302

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18. ——— Surety not released by reason of another interposing in his stead but not signing the undertaking. *Horn* v. *Loedolff et Uxor* 403

19. ——— A surety is not released, although the mortgage given by the debtor be annulled, under proclamation of 6th September, 1805. *Nisbet & Dickson* v. *Thwaits* 427

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21. ——— It will not bar objection of nullity, in respect of want of due registration of mortgage bond, in the Colonial Debt Register, that the sureties of another bond, duly registered, had, by a clause in such latter bond, declared themselves satisfied with the mortgage contained in the former unregistered bond. *In re Wahl* 433

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24. ——— A surety, having renounced the benefit of excussion, is not released by creditor's refusal to take a bond from him, the surety, and cede debt, or to discuss the debtor. Release in this way is only the privilege of simple sureties, and not of those who have so renounced. *Overbeek* v. *Cloete* 523

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4. ——— A guardian entering into litigation concerning the property of minors, without the authority of the Court, is personally liable for costs, and cannot recover from minors if unsuccessful. *Ibid* ..

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2. ——— A wife has no *persona standi in judicio*, therefore a widow re-married (although out of community of property and with the exclusion of the *jus mariti*) to a second husband, *held*, upon objection of her husband, incompetent to appear in Court to confess judgment for the amount of a *kinderbewys*, executed before the second marriage, by which the paternal portions of the children of the first marriage had been ascertained. *Prince q.q. Dieleman* v. *Anderson and others* 176

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4. ——— A woman married in community cannot be bound as a surety without her husband's consent. *Ibid.*

5. ——— When a woman married out of community is sued, the summons must be served also on the husband. *Landsberg* v. *Marchand* 200

6. ——— Rule nisi granted to a wife married out of community, calling on her husband to assist her in appearing to and defending an action commenced against her. But this rule subsequently not made absolute in the particular case. *Gray* v. *Spenyler* 201

7. ——— Cession by a husband, married out of community, of a bond, the separate property of his wife, by virtue of a general power of attorney from her in his favour, held good, independently of the circumstance that the wife had not, in the ante-nuptial contract, reserved to herself the administration of her separate property. *Laing* v. *Zastron's Executrix* 299

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11. —— Application for an interlocutory judgment decreeing the wife to return to her husband pending certain proceedings between them respecting an interdict regarding property, refused. *Ibid.*

12. —— Damages awarded for harbouring a wife who had deserted her husband. *Le Roex* v. *Van Wyk* 253

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2. —— ———— Where in the terms of a mutual will, made by two persons married in community, the survivor was entitled to the usufruct of the inheritance of a minor child, under the burden of maintaining and educating the minor, and the mother, surviving, had for some years allowed the interest of the minor's inheritance, except a small annual amount for his maintenance, to accumulate in the hands of the Master of the Supreme Court, as guardian of the minor, who at the same time administered his property, the Court held that the plaintiff, who had married the widow in community, and who had also for several years after his marriage with her allowed the interest to accumulate as before, was entitled to bring an action for the recovery of the interest accumulated, both before and after his marriage, as being property of the community. *De Smidt* v. *Burton, Master of the Supreme Court* .. 222

3. —— ———— On the ground of erroneous construction of mutual will by executors, the liquidation account was re-opened, and certain legacies which the testator (who had been previously married (had bequeathed to his god-children in a will made jointly

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with his first wife, especially reserved in the present will, which legacies had been charged against the joint estate, were charged against the testator's separate estate; and further, a certain amount chargeable during the marriage against the joint estate was held by the terms made use of in the will by the testator "expressly desiring that the same may be strictly observed and performed by *his* testamentary executors," to have become chargeable on his separate estate. *Reis* v. *Executors of Gilloway* 186

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INDEX AND DIGEST OF CASES

DECIDED IN

The Supreme Court

OF THE

CAPE OF GOOD HOPE,

AS REPORTED BY THE LATE

HON. WILLIAM MENZIES, ESQUIRE,

(SENIOR PUISNE JUDGE OF THE SUPREME COURT);

AND

REVISED AND EDITED BY

JAMES BUCHANAN,

ADVOCATE OF THE SUPREME COURT.

COMPILED BY

EBEN. J. BUCHANAN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BETWEEN THE

YEARS 1828 AND 1850.

WYLDE, C.J.

MENZIES, J. *Died at Colesberg, Nov.* 1, 1850.

BURTON, J. *Left for New South Wales*, 1832.

KEKEWICH, J.

MUSGRAVE, J. *Appointed Oct.* 12, 1843.

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PURCHASE, SALE, AND TRANSFER.
LETTING AND HIRING.
MANDATE.
PARTNERSHIP.
BILLS OF EXCHANGE AND PROMISSORY NOTES.
SERVITUDE.
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SUCCESSION EX TESTAMENTO.
SUCCESSION AB INTESTATO.
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11. ——— A ship having been condemned as unseaworthy in one of the ports of the colony, and sold by the agents on behalf of the owner, in an action brought by the assignees of the owner against the agents to account for the proceeds, the Court ordered the account rendered to be debated, notwithstanding that the charges in it to which objection were taken had been admitted in an account current signed as correct and settled between the agents and the master of the ship. A charge of 2½ per cent., made as commission on transhipment of certain oil forming the cargo of the ship, to another vessel, was reduced to 1½ per cent. after hearing the evidence of merchants on the subject. A charge for commission for entering into a security bond to answer the adjudication of an action in the Vice-Admiralty Court by the crew for wages, in regard of which the ship had been arrested, was wholly disallowed, the action having been dismissed and the bond thereby rendered void. An account paid by the agents to the master as a balance alleged by him to be due on an account-current between him and the owner disallowed, as having no relation whatever to their agency. The agents had no right to take upon themselves, without authority, to admit the correctness of, and pay, claims by the master on account of transactions between him and the owner prior to their agency. A payment to two of the crew of wages due to them, which they might have enforced out of the proceeds of the hull, was maintained as having been made beneficially for the plaintiff. *Nicholls* v. *Thomson, Watson & Co.* 186

12. ——— Where on voluntary separation *à mensâ, thoro, et communione*, an attorney of the Court was appointed by the husband as his agent in the administration of the joint estate—*Held*, that such

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attorney was entitled only to commission as agent, and not to fees as an attorney. *Trustee of Ziedeman* v. *De Wet* 190

13. AGENT—A general power of attorney, *cum specialibus potestatibus*, without special authority to sell immoveable property, does not authorize the agent to sell and transfer immoveable property belonging to the principal. Circumstances in which a transfer by virtue of such a power, together with a holograph letter of the principal, was allowed by the Court, without prejudice to the principal's rights. *Moodie* v. *Registrar of Deeds* 190

14. ——— A commission agent who has rendered an account-current of his commission sales, showing a balance in favour of his principal, cannot be sued for such balance in a provisional case. *Smith* v. *Southey* 192

15. ——— On the insolvency of a factor, his principal is entitled to vindicate as his own property, all goods which he can trace to have been consigned by him to the factor, to be sold by the latter as factor, which at the date of insolvency are in the factor's possession; the property in these goods forming no part of the factor's estate. *Chiappini & Co.* v. *Jaffray's Trustees* 192

16. ——— Where a factor had sold the goods of his principal, and taken bills in his own favour in payment, which bills remained in the factor's hands at the date of the sequestration of his estate, the principal was held entitled to these bills to the extent of the balance remaining due on account of the proceeds of the goods consigned and not paid or remitted for before the insolvency. *Ibid.*

17. ——— A factor having sold his principal's goods, and having been sequestrated before the price of the goods has been paid by the purchaser, the principal may sue for such unpaid price, although the goods have been sold by the factor in his own name. *Ibid.*

18. ——— The fact of a factor's having credited his principal with the price of the goods, as sold, in his books, does not affect the principal's rights. *Ibid.*

19. ——— An agreement that a factor should receive a *del credere* commission does not affect the rights of his principal. *Ibid.*

20. ——— The stating of an account-current between the principal and factor, and the bringing of an action by the principal for the balance of this account-current before the surrender of the factor's estate, do not affect the principal's rights on the insolvency of the factor. *Ibid.*

21. ——— The balance for which a principal is creditor, and the transactions with the factor, being greater than the amount of the bills and outstanding debts claimed, this amount is not subject to deduction on account of costs, charges, and commission of the factor. *Ibid.*

22. ——— Where certain promissory notes by purchasers in favour of the factor, represent, in part, goods of the principal, the principal is entitled to a proportion of the proceeds of these notes corresponding to the amount of the price of his goods, as if they had been granted for the exact amount of the price of his goods. *Ibid.*

22. ——— Bills granted by an auctioneer to the factor are in the same position as bills by the purchaser directly in the factor's favour. *Ibid.*

24. ——— Where the defendant was in the habit of buying goods

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through R., such goods being supplied by wholesale houses on credit given to R., and an account was stated between defendant and R., in which defendant acknowledged himself indebted to R. for the goods so supplied—*Held*, that on R.'s insolvency his trustees were entitled to recover, and that defendant could not relieve himself from the liability of his acknowledged debt to R. on the account stated by settling direct with the persons from whom the goods were obtained. *Roussouw's Trustees* v. *Becker* 199

25. AGENT—The waiver by an agent of due presentment and protest of a foreign bill of exchange, and of due and sufficient notice, will bind his principal. Notice of non-acceptance and dishonour given to agent, sufficient. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* 239

APPEAL—Bond for prosecuting appeal can be enforced against its sureties by rule of Court without a regular action, when the bond consents, in its terms, to execution issuing on the default of the appellant to prosecute the appeal. *In re Anderson* 7

2. ——— In an action for the balance of an account, an appeal to the Privy Council was refused until after definitive accounting had taken place between the parties. *Still* v. *Norton* 211

3. ——— Where the ground of objection in the Court below (reserved for the decision of the Supreme Court) was merely that a certified copy of a will was not evidence—*Held*, that the appellants could not now go further, and object that the instrument produced was not a regular and duly certified copy. *Bekker* v. *Meyring* 436

4. ——— Where on the appeal the appellant sought, as one ground of setting aside the judgment of the Circuit Court, to object that some of the heirs interested in the will had not been made parties to the cause. *Held*—that this should have been excepted in the Court below, *initio litis;* and that although there are matters in bar, of which this Court will take notice, although not pleaded below, and will in respect thereof reverse the judgment of the Court below, yet that this was not one. *Ibid.*

APPROPRIATION OF PAYMENTS—What amounts to evidence of appropriation. *Openshaw, Unna, & Co.* v. *Truter* 252

2. ——————————— An agent of a ship bound to appropriate amounts received indefinitely in payment of items of debt secured by hypothec. *Norden* v. *Solomon q.q. Assignees of Charke* 377

ARBITRATION—Exception of agreement to submit to arbitration overruled. *Rens* v. *Bam's Trustee* 89

2. ——————— Submission to arbitration between the maker and the payee of a promissory note bars the payee from recovering provisional sentence on the note pending the submission. *Hovil & Mathew* v. *Wood* 261

ASSIGNEES—Affidavits of English assignees themselves and one of the bankrupts not sufficient proof of appointment. *Nisbet & Dickson* v. *Venables* 179

ATTORNEY—Where on voluntary separation *à mensâ, thoro, et communione*, an attorney of the Court was appointed by the husband as his agent in the administration of the joint estate, *held*, that such attorney was entitled only to commission as agent, and not to fees as an attorney. *Trustee of Ziedeman* v. *De Wet* 190

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2. ATTORNEY—An attorney employed by an executor to recover a debt due to the testator has a preference on the amount of the judgment in the sheriff's hands for his costs of this action, but has no preference for his account against the executor for other business done, not in connection with the testator's estate. *Thomas* v. *Barker* .. 321

AUCTION DUES—PREFERENCE OF GOVERNMENT FOR: *See* GOVERNMENT.

AUCTIONEER—Government has no claim for auction duties against any person or estate, except the person who, under the license, held the sale as auctioneer, and his sureties, and his and their estates. W. and B., partners in business as auctioneers, took out individual licenses as auctioneers, and afterwards surrendered both partnership and private estates. Government was ranked preferently on the separate estate of B., for auction dues on sales held by him under his individual license. The separate estate being insufficient, the Government claimed preference on the partnership estate. The trustee rejected the claim altogether, as not being for a partnership debt. B.'s sureties to government appealed to the Court, but the decision of the trustee was upheld. *Sureties of Wolff* v. *Trustees of Wolff* 36

2. ———— *Semble* (per Wylde, C.J.), that an auctioneer, as agent for the seller, has such power to alter the conditions of sale as to authorize him, without the knowledge of the seller, to vary the conditions from payment by instalments to instant payment in cash, and to bind the seller to that transaction. *Hare* v. *Kotzé* 94

3. ———— A purchase made by an auctioneer at an auction held by himself, is not absolutely null and void *ab initio*, but is only liable to be set aside in respect of the circumstances under which it may have been made. *Norden* v. *Bonnin's Trustees* 124

BILL OF EXCHANGE—Notice to the drawer of non-acceptance of a bill of exchange by the drawee, necessary from original payee or subsequent holder; information of non-acceptance coming from third party having no interest in the bill being insufficient. *Venning q.q.* v. *Venables* 228

2. ———— Foreign bills of exchange, after sight, must be presented for acceptance or put in circulation within a reasonable time. What is reasonable time, guided by the custom of the place where drawn; if none, then by the circumstances of the case. [But not specially decided in this case, judgment being by consent.] *Semble*, three months a reasonable time. *Ebden* v. *Liesching* 228

3. ———— In a provisional claim against the drawer, presentment of a bill of exchange must be proved, although the acceptor had become insolvent before the bill fell due. *Thomson & Co.* v. *Archer* 228

4. ———— How far the allegation of nullity of the debt as arising from a gambling transactio ı is a defence to provision where the instrument of debt (being a bill of exchange or order) expresses no *causa debiti*. [Per Wylde, C.J., and Kekewich, J.: Yes; per Menzies, J., and Burton, J.: No. Court equally divided; no judgment.] *Freshfield* v. *Harries* 228

5. ———— Whether a defendant is entitled to refer to the plaintiff's oath to prove the nullity of the debt as being a gambling transaction, as a defence against a provisional claim on a bill of exchange. [Per Menzies and Burton, JJ.: Yes; per

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Wylde, C.J., and Kekewich, J.: No. [Court equally divided; no judgment.] *Kennel* v. *Harries* 229

6. BILL OF EXCHANGE—Proof of presentment of a bill of exchange by the production of a notarial protest for non-payment, in which protest presentment is alleged, cannot in a provisional case, be negatived by parol evidence. *Hovil & Mathew* v. *Poulteney* .. 229

7. ——— After provisional sentence obtained by the holder of a bill against the drawer and acceptor, the drawer, on execution, surrendered his estate, and the acceptor returned *nulla bona*. The holder then took a compensation of one-half the amount of the bill from the drawer's estate, expressly reserving his right against the acceptor for the balance, and then prayed civil imprisonment of the acceptor, who objected that the composition freed him from further liability. *Held*:—Not, and civil imprisonment granted accordingly. *Mocke* v. *Van Breda* 229

8. ——— Provisional sentence refused against the defendant, who after protest for non-payment, had guaranteed the payment of a bill of exchange to the drawer, there being no proof offered of any demand on and refusal by the acceptor after such guarantee by the defendant. *McDonald* v. *Sutherland* 230

9. ——— It is a good defence to a provisional claim against two late partners on a bill of exchange, that it had been drawn by one partner only, after dissolution of the partnership. *Davis & Son* v. *McDonald & Sutherland* 230

10. ——— Sequestration of acceptor of a bill of exchange does not dispense with necessity of presentment and notice of dishonour. The notice in the *Gazette* of the sequestration of the acceptor's estate is not sufficient. *De Ronde* v. *Zeyler* .. 230

11. ——— Parol evidence is not competent on provision to prove the dishonour of a bill of exchange. *De Ronde* v. *Zeyler* 231

12. ——— It is a good defence against a provisional claim on a bill of exchange that the holder, who was the payee, had, after the drawing of the bill, been sequestrated as insolvent, and that, although since rehabilitated, no assignment to him had been made by the sequestration creditors. *Barry* v. *Bailey* .. 231

13. ——— In a provisional claim on a bill of exchange by an indorsee, the summons must aver the endorsement. *Moore* v. *Alexander* 231

14. ——— Joint acceptors found liable only *pro ratâ*. [But overruled, *Kidson* v. *Campbell*, p. 279.] *Rens* v. *Cantz and others* 231

15. ——— What such qualified indorsation of bill of exchange as not to entitle holder to sue. *Thomson & Watson* v. *Allen* 232

16. ——— A copy of the protest for non-payment of a bill of exchange need not be served on the defendant. *Rens* v. *Van der Poel and another* 233

17. ——— It is not necessary in a provisional claim against the indorser of a bill of exchange to allege in the summons that the bill had been presented to the acceptor, and that payment had been refused. *Ibid.*

18. ——— Provisional sentence refused against the

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acceptor of a bill of exchange, payable at a particular place, because presentment at such place was not duly alleged in the summons and proved. *Simpson Brothers* v. *Allingham* 233

19. BILL OF EXCHANGE—Where a provisional judgment had been given on a bill of exchange against defendant as executor, and execution had been taken out against him in that capacity, and a return of *nulla bona* made, the Court, on further application by the creditor, refused to allow execution to issue on the same sentence, with an alteration in its terms, against the executor, *de bonis propriis*, or to give a new provisional sentence against him personally. *Jantzen* v. *Van den Burgh* 233

20. ——————— A bill or order payable on a contingency respecting which extrinsic proof would be required, is illiquid. *Geert* v. *Van As*.. 235

21. ——————— The drawer of a bill of exchange is not provisionally liable to the acceptor, who has paid the bill; such payment may have been out of the drawer's own funds. *Norden* v. *Stephenson* 235

22. ——————— The possession of a bill of exchange by one of three joint acceptors, coupled with an acknowledgment on the face of the bill from the holder, does not afford such presumption of payment by this one only as to entitle him to sue the other two provisionally for their shares. *Gie* v. *De Villiers* 236

23. ——————— The liquidity of an accepted bill of exchange is not affected by the fact that it was not addressed to any one. *Holtman* v. *Dormehl* 236

24. ——————— Where the acceptor and the drawer and endorser of a bill of exchange are summoned, it is not necessary to produce proof of presentment or demand for payment having been made to acceptor. *Muller* v. *Van Oudtshoorn and another* .. 236

25. ——————— It was doubted whether a blank endorsement of a bill of exchange, originally made for the purpose of conveying the bill to a party other than the plaintiffs, and the fact that the bill did not come into plaintiff's possession until after it had been protested for non-payment at the instance of the party in whose favour this indorsation had been made, entitled the plaintiffs to found on that indorsation in a provisional case. *Borradaile, Thomson, & Pillans* v. *Morkel* 237

26. ——————— Presentment of an English bill of exchange at specified place of payment in England not necessary to entitle holder to judgment against the acceptors here. *Williams & Co.* v. *Farmer* 238

27. ——————— An accepted bill payable on a contingency requiring extrinsic proof is illiquid. *Norton* v. *Speck and another* 239

28. ——————— Provisional sentence refused (Menzies, J., *diss.*) against the drawer of a bill of exchange payable ten days after sight, in respect that there was no protest alleging presentment for acceptance or sight to the drawee, though a protest for non-payment was produced. *Phillips & King* v. *Ridwood* .. 239

29. ——————— Where a bill of exchange is drawn in this colony, by a person domiciled in India, but here on a casual visit, on a firm in Calcutta, the question whether a presentment of the bill when due for payment, a protest for non-payment, and due

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notice of such presentment and protest are necessary, must be decided by the *lex loci solutionis* and not by the *lex loci contractus*. The Court are bound judicially to take notice of the statute 13 Geo. 3, c. 63, and the Royal Letters Patent made in pursuance of its provisions, and these furnish legal evidence that the law of England was the law of Calcutta in so far as relates to bills of exchange. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* .. 239

30. BILL OF EXCHANGE—By the law of England it is not necessary for the holder of a bill, who had duly protested it for non-acceptance, and given due notice thereof, afterwards to present the bill when due for payment, protest it for non-payment and give due notice of such presentment and protest, in order to entitle him to recourse against the drawer and endorser. *Ibid.*

31. ——————— Where L. P. drew a bill on C. H. v. L., afterwards altered to and accepted by W. F. H. v. L., the defendant, who admitted the altered signature to be his, and defendant objected on the ground of the alteration, the Court held defendant liable. Defendant then claimed absolution for variance between the summons which described the bill as drawn on him, whereas it was drawn on his father; but the Court held that unless defendant would swear that the alteration was subsequent to his unconditional acceptance (which he declined to do) he was bound. *Borradailes, Thompson, & Pillans* v. *Von Ludwig* 247

32. ——————— B., not domiciled in the colony, drew, February 7, 1843, a bill of exchange on K., of Liverpool, at sixty days' sight, in favour of D. N. & Co., who endorsed it to plaintiffs. The bill was not accepted or paid, and was duly protested. The protests were sent to the colony, and on December 7, 1843, plaintiffs gave notice to the drawer (having been prevented from doing so previously by the absence of the drawer from the colony until shortly before that date). *Held*—that this notice was sufficient. *Norton & Co.* v. *Bain* 251

BILL OF SALE—Of moveables, without delivery, gives no *jus in re*, and holder of such bill cannot claim moveables attached in seller's possession. *Robertson* v. *Sequestrator* 88

BOND—Possession of a bond by one of two sureties, with an acknowledgment endorsed on it by the creditor that he had received payment of the whole from this one, is not sufficient evidence of payment by such surety to enable him to claim provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 20

2. —— Exception of insufficient assignment of breach of condition of a bond must be pleaded *initio litis*. *Rogerson, N. O.*, v. *Meyer and another* 38

3. —— A creditor on a penal bond is not bound to excuss the principal debtor before proceeding against sureties. *Ibid.*

4. —— A bond is demandable from a surety without notice upon insolvency of the principal debtor. *Baard* v. *De Villiers* 55

5. —— Ranking on insolvent estate of a bond in conflict with a deed of *kinderbewys*: *See* KINDERBEWYS.

——— *See* MORTGAGE; SURETY; REGISTRATION.

BOOKKEEPER—A bookkeeper has no lien on the books of his insolvent employer for moneys lent and advanced. *Spangenberg's Trustee* v. *Cousins* 343

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BREACH OF CONTRACT—Of sale, no defence against payment of price for what has been delivered to buyer; only a ground for action of damages. *Stiglingh* v. *De Villiers* 89

2. ——— Where a Kafir war prevented the defendant from fulfilling a contract to deliver Kafir gum, *held* that plaintiff was nevertheless entitled to damages for breach of contract. *Norden* v. *Shaw* 150

BROKER—Sale on invoice by: *See* INVOICE.

BURGHERSHIP—A foreigner not having obtained a deed of burgher-ship could not have transfer lawfully made to him of land purchased by him. *Assue* v. *Curator of Assue* 148

CAUSA DEBITI—Must be specifically set forth in the declaration. *Jacobson* v. *Norton* 218

CESSION—A lessee is entitled to compensate against the claims for rent due prior to a cession of the lease, all liquid claims due by the cedent to the lessee before the cession; but as regards rents coming due after notice of the cession, he cannot compensate debts due to him before the cession. *Smith* v. *Howse* 163

2. ——— Where a note not originally made to order had been ceded by the payee to A. or order, *held* that a simple indorsation by A. was sufficient to entitle his indorsee to sue, without requiring a formal cession. *Thomson, Watson, & Co.* v. *Malan* 270

3. ——— of securities by a debtor to a creditor, with the object that the creditor might apply the amount received in extinction of his debt, vests in the creditor absolutely all right and title in the securities, subject only to an equitable right to call for an account of the sums received. *Sutherland* v. *Elliott Brothers* 349

CESSION OF ACTION: *See* SURETY.

CHILDREN—Surviving parent bound, under clause of mutual will giving usufruct of children's portion, to defray expenses of their education out of the interest of their portion, and if such interest is exceeded, must make good the balance. *Prince q.q. Dieleman* v. *Berrange* 393

2. ——— A bequest to a daughter, and on a certain condition, over to "her children," *held* to mean such children only as were alive at the death of the testatrix, and not those born after her death. *Bresler* v. *Kotze's Executors* 444

CIVIL IMPRISONMENT—Decree of, granted for non-performance of a judgment by which certain sureties were ordered to perform an undertaking of suretyship. *Wolhuter* v. *De Villiers and others* .. 37

2. ——— After provisional sentence obtained by the holder of a bill of exchange against the drawer and acceptor, the drawer on execution surrendered his estate, and the acceptor returned *nulla bona*. The holder then took a composition of one half the amount of the bill from the drawer's estate, expressly reserving his right against the acceptor for the balance, and then prayed civil imprisonment of the acceptor, who objected that the composition freed him from further liability. *Held*, it did not, and civil imprisonment granted accordingly. *Mocke* v. *Van Breda* 229

CODICIL—A codicil made under the reservatory clause, revoking a legacy to heirs, held valid. *Brink q.q. Breda* v. *Voigt and another* 394

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COLLATION: *See* COMPENSATION.

COMMISSION: *See* AGENT.

COMMUNITY—Where, during the community, the husband had entered into a suretyship, for which he became liable, and had afterwards surrendered his estate as insolvent, and had since died, *held*, that the surviving widow, who had nothing out of the joint estate at the death of her husband, but had since acquired property of her own, and had not duly repudiated or abandoned her interest in the joint estate at the time of her husband's death, could be sued for half the amount of the suretyship. *Brink* v. *Louw, Widow of Niekerk* 71

———————, NON: *See* NON-COMMUNITY.

COMPENSATION—The purchaser of landed property at public auction is entitled, when provisionally sued on conditions of sale for the first instalment of the purchase-money, to compensate as against such instalment, the amount of a bond on the same property of which he was the holder. *Eaton, N. O.* v. *Johnstone* 89

2. ———————— A lessee, the lessor having ceded the lease to a third party, is entitled to compensate against the claims for rent due prior to the cession, all liquid claims due by the lessor to the lessee before the cession; but as regards rents coming due after notice of the cession, he cannot compensate debts due to him before the cession. *Smith* v. *Howse* 163

3. ———————— Compensation of inheritance of minor grandchildren allowed with debt due by their father to their grandfather. The father, who died before the grandfather, having, during the lifetime of both, acknowledged the deed and expressed in writing his willingness that such debt should be deducted from the inheritance he was to receive, *held*, that this was a discharge by the father *pro tanto* of his claim under the will, and bound his representatives. *Richert's Heirs* v. *Stoll* 395

4. ———————— A. and B. claimed certain inheritance from the estate of their grandfather, *jure representationis* their deceased parents. The grandfather's widow and executrix wished to compensate with such inheritance a debt paid by her, on account of the grandfather, for A. and B.'s father, for a suretyship debt. But the Court gave judgment for plaintiffs on the ground that there was no proof of A. and B.'s adiation of their parents' estate, which fact alone could found compensation. *Fehrzen* v. *Horak* .. 412

———————— PLEA OF: *See* PLEADING.

COMPOSITION—No majority of consenting creditors can bind any minority of dissenting creditors to take less than the full amount of their debts, unless the power of so binding the minority is, by legal enactment, expressly given to the majority. The provisions of the 81st section or of any other section of Ordinance No. 64, cannot be legally construed as giving any such power to any majority of creditors. *De Smidt* v. *Blanckenberg* 248

CONDITIONS OF SALE—A surety signing conditions of sale liable to be proceeded against on provision. *Orphan Chamber* v. *Sertyn and others* 7

2. ———————— In a provisional claim on conditions of sale for the first instalment of landed property purchased at public auction, the defendant was held entitled to compensate the amount of a mortgage bond over the same property of which he was the holder. *Eaton, N. O.* v. *Johnstone* 89

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3. CONDITIONS OF SALE—*Semble*, an auctioneer, as agent for the seller, has such power to alter the conditions of sale, as to authoize him, without the knowledge of the seller, to vary the conditions from payment by instalments to instant payment in cash, and to bind the seller to that transaction. *Hare* v. *Kotze* 94

4. ——————— Written conditions of sale can be altered by parol. A purchaser at a sale of land discharged from obligation to find personal security for payment of instalments in terms of the conditions of sale by verbal agreement made during the sale to exempt him from such obligation. *Buyskes, Trustee of Buissinne* v. *Holl* 110

CONFESSION OF JUDGMENT—Cannot be made by a widow remarried (although out of community and with exclusion of the *jus mariti*) to a second husband for the amount of a *kinderbewys* executed before the second marriage, by which the paternal portions of the children of the first marriage had been ascertained, she being under her husband's legal guardianship, and having no *persona standi in judicio* without him. *Prince q.q. Dieleman* v. *Anderson* 393

CONSIDERATION—Is not necessary to support a promise to pay. *Jacobson* v. *Norton* 218

CONTRACT: *See* BREACH OF CONTRACT.

CONTRACT OF SALE—Considered, in this case, as completed by the purchaser's letter, coupled with the seller's unqualified and unconditional acceptance of the offer therein contained. *Fry* v. *Reynolds* 153

CONVEYANCE: *See* TRANSFER.

COSTS—Security for costs not exigible from the plaintiff, who was an *incola*; nor from one who, although no *incola*, has immoveable property in the colony. *Witham* v. *Venables* 1

2. —— Security for costs not exigible from the plaintiff, a military man in service at the Cape, he being considered an *incola*. *Dunlevie* v. *Harrington & Gadney* 1

3. —— An attorney, for proceeding in the name of a dead person, not allowed his costs where the death was known to him. *Heartley* v. *Poupart* 180

4. —— A judgment for costs against a plaintiff suing as agent for another, is not executable against him personally unless so ordered. *Brink q.q. Breda* v. *Voigt and another* 180

5. —— Where the plaintiff had withdrawn a provisional summons, he cannot proceed anew until the costs of the former summons have been paid. An offer of such costs into Court on the return day of second summons is not sufficient. *Simson & Co.* v. *Fleck* .. 255

6. —— Where a promissory note is not made payable at any specified place, and summons is issued against the maker without previous presentment—*Held*, that if the defendant, after being summoned, tendered payment of the debt to the plaintiff or his attorney, he was not liable for the costs, even of the summons. *Brink* v. *Gough*; *Redelinghuys* v. *Theunissen* 256, 258

7. —— The debtor on a promissory note is not liable to the costs of a notice to pay served on him by the holder. *Wicht* v. *Faure* .. 259

8. —— Where the maker of a promissory note not made payable at any specified place, and no presentment having been made, by

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first post after receipt of summons caused a tender to be made—*Held*, sufficient to free from costs. *Orlandini* v. *Pope* 260

9. COSTS—Costs not prayed for on the day of order made may be afterwards prayed for, but no costs given for such second application. *Ibid.*

10. —— Provisional sentence granted on a promissory note where the signature had been previously denied and the plaintiff had then failed to prove the same, but refused for the costs to which the plaintiff was put by such denial. *Birkwood* v. *Van Rooyen* .. 280

11. —— Where a note was made payable at a particular place "in the month of October," and notarial protest was made on the 22nd of November, such protest held unnecessary, and costs thereof disallowed. *Beukes* v. *Van Wyk* 282

12. —— Where a note is made payable at a particular place, on a particular day, and is presented on behalf of the creditor at that place and not paid, he is entitled to the fair costs of such presentment, although the notary have to travel a far distance to make it. But not if the note be duly paid. *Ibid.*

13. —— Where an accepted acknowledgment is made payable on presentation, and no presentation is made before summons is issued, a tender of the amount of the note, without costs, is sufficient. *Johnstone* v. *Kotze* 284

14. —— Where the holder of a note not made payable at a particular place summoned the defendant without presentment, the Court awarded the costs to defendant; but holding that defendant, immediately on service, should have tendered the amount on condition of the note being presented, which he had not done until the day of hearing, gave plaintiff the costs of the day. *Steytler* v. *De Villiers* 286

15. —— An attorney employed by an executor to recover a debt due to the testator has a preference on the amount of the judgment in the sheriff's hands for his costs of this action, but has no preference for his account against the executor for other business done not in connection with the testator's estate. *Thomas* v. *Barker* .. 321

16. —— Trustees of an insolvent estate, defendants in an action, condemned in costs *de bonis propriis*. *Kotze* v. *Kotze's Trustees* .. 414

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2. ———— How a person under curatorship by reason of insanity should proceed if during a lucid interval he desire to make a will. *In re Kemp* 435

DAYS OF GRACE—There are no days of grace allowed on notes and bills in this colony. *Cruywagen* v. *Oliviera and another*; *Randall's Trustee* v. *Haupt* 254, 281

DEBTOR—Co-Principal—Debtors not having renounced the benefit of division, liable *in solidum*, and not *pro ratâ*. *Du Toit's Trustees* v. *Smut's Executors and another* 24

2. ———— Funds of a principal debtor not within the jurisdiction of the Court cannot be excussed, nor their non-excussion pleaded by sureties in defence. *Rogerson, N. O.* v. *Meyer and another* .. 38

3. ———— An exception of non-excussion of the principal debtor must be taken *initio litis* before joining issue on the merits. *Ibid.*

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4. DEBTOR—A creditor on a penal bond need not excuss the principal debtor before proceeding against sureties. *Rogerson* v. *Meyer and another* 38

5. ——— A creditor is not required, in order to entitle him to recover against sureties, to make demand upon the principal debtor for the payment of the debt when it becomes due, nor to give notice to sureties of the debtor's default. *Ibid.*

6. ——— A co-principal debtor on a bond, who is also surety, is released, notwithstanding that he is such co-principal debtor, from liability on the bond, when the creditor has lost the special mortgage by non-registration of the bond. *Kotze* v. *Meyer* .. 6

7. ——— Co-principal debtor on a bond, who is also surety, not discharged by the non-proof of the bond on the insolvent estate of the principal debtor, and whose estate has since been rehabilitated. *Hoets's Executors* v. *De Vos* 53

DECLARATION—What is a sufficient assignment of a breach of the condition of a bond in a declaration. *Rogerson, N. O.* v. *Meyer and another* 38

DEED OF INDEMNITY: *See* INDEMNITY.

DEED OF TRANSFER: *See* TRANSFER.

DELIVERY—An acknowledgment of the receipt of the purchase price of goods "to be delivered" is sufficient to found a claim for provisional sentence for the repayment of such price, the *onus probandi* the delivery being on the defendant. *Dreyer* v. *Roos* .. 87

2. ——— The delivery of goods sold on credit, vests the *dominium* in the purchaser. *Commissioner for the Sequestrator* v. *Vos* 87

3. ——— A bill of sale of moveables, without delivery, gives no *jus in re*. *Robertson* v. *Sequestrator* 88

4. ——— In an action against a trustee of an insolvent estate, certain moveables were claimed, alleged to have been purchased from the insolvent several months before the insolvency, and in proof thereof the plaintiff produced notarial agreements of sale and purchase, in which all right and title in the moveables were stated to be ceded and transferred by the insolvent to the plaintiff, and the plaintiff let to the insolvent the said moveables at a monthly rent for a time within which the insolvent should have the right of re-purchase at the price paid to him, and evidence was called to shew that on the premises of the insolvent the property had been pointed out to a neighbour as having been sold to the plaintiff by the insolvent, and let to the insolvent by the plaintiff:—*Held*, that there was no proof of such a *bonâ fide* sale and real and *bonâ-fide* delivery as was in law sufficient to divest the insolvent of the right of property (*jus dominii*) in the goods. *Rens* v. *Bam's Trustee* 89

5. ——— An agreement of sale of immoveable property, followed by delivery of possession by the vendor to the purchaser, gives the purchaser nothing more than a *jus ad rem* and a personal claim against the vendor to convey the *jus in re* or *dominium* to him, by transfer *coram lege loci*. *Harris* v. *Trustee of Buissinne* 105

6. ——— Where a ship has been sold, and actual delivery taken by the purchaser, though the price may not have been paid, nor the requisites of the Registry Acts necessary to pass the *jus in re* complied with, the *periculum* of the vessel is transferred to the purchaser. *Terrington* v. *Simpson* 110

7. ——— Delivery is necessary to make effectual a special mortgage of moveables. *Smuts* v. *Stack and others* 309

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8. DELIVERY—*Pignus prætorium*, constituted by attachment, is equivalent to *pignus mobilium* completed by delivery, and is preferent to a tacit or legal general hypothec of prior date. *Cloete* v. *Colonial Government* 312

9. ———— Moveables delivered to a mortgage creditor cannot be seized in execution of a judgment in an action commenced before such delivery took place. *Haupt* v. *Hancock* 347

10. ———— A cession of securities by a debtor to a creditor, accompanied by delivery, vests in the creditor absolutely all right and title in the securities, subject only to an equitable right of being required to account for the sums received. *Sutherland* v. *Elliott Brothers* 349

DIAGRAM—Where the purchaser of landed property bought under condition to pay the expenses of diagrams, *Held*, that he was not liable for the expenses of a general plan. *Executor of Batt* v. *Maynard*.. 136

DIVISION—The *beneficium divisionis* continues between solvent and insolvent partners of a dissolved firm. *Luck* v. *Chabaud* 207

DOMINIUM—The property in goods sold and delivered on credit passes by the delivery to the purchaser. *Commissioner for the Sequestrator* v. *Vos* 87

2. ———— The *dominium* of immoveable property could, by the law of Holland, be conveyed only by transfer *coram lege loci*. This rule was introduced into this colony with the rest of the laws of Holland on its first settlement in 1652, and has been acted on invariably ever since, except that by colonial laws the registrar of deeds has been substituted for the magistrates before whom, in Holland, such transfers were required to be made. *Harris* v. *Trustee of Buissinne* 105

3. ———— The *dominium* of immoveable property, on the order of the sequestration of the vendor's estate, no conveyance *coram lege loci* having been effected, vests in the Master of the Supreme Court, and ultimately in the trustee for the benefit of creditors. *Ibid.*

4. ———— The *dominium* of a vessel sold and delivered does not pass until the requisites of the Registry Acts have been complied with. *Terrington* v. *Simpson* 110

5. ———— Immoveable property sold by an insolvent before his insolvency but not transferred, remains vested in the insolvent estate. *Trustee of Smith* v. *Norden* 128

EDUCATION—OF CHILDREN: *See* CHILDREN.

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ENGLISH ASSIGNEES: *See* ASSIGNEES.

ENGLISH BANKRUPT: *See* INSOLVENCY.

ESTOPPEL—Acquiescence by the heirs of a testator in the widow's entering on the administration of the estate of her deceased husband, and continuing therein until after the sale and final liquidation thereof, does not bar such heirs from coming into Court to set aside a notarial deed in which the testator professed to have reinstated the widow as executrix, after having by codicil revoked the mutual will whereby she had been originally appointed. *Horak* v. *Horak* 402

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2. ESTOPPEL—An heir under a mutual will, receiving half the inheritance from the surviving spouse, and granting a full discharge in writing, is estopped from disputing a subsequent will made by the survivor, in which the first will was revoked to the extent of such survivor's estate. *Wessels* v. *Executors of Rensburg* 425

EVIDENCE—Extrinsic evidence not admissible on provision. *Cloete* v. *Eksteen*; *Geert* v. *Van As* 20, 235

2. ———— Parol evidence is not admissible in a provisional case to negative proof of presentment of a bill of exchange given by production of a notarial protest for non-payment, in which protest presentment is alleged. *Hovil & Mathew* v. *Poulteney* 229

3. ———— Parol evidence is not competent to prove on provision the dishonour of a bill of exchange. *De Ronde* v. *Zeyler* 231

4. ———— Presentment and non-payment of a promissory note are not in a provisional case provable by affidavit. *Meiring* v. *De Villiers* 256

5. ———— Parol evidence of usury and fraud not received in defence against provisional claim on a promissory note. *Muller* v. *Redelinghuys and another* 257

6. ———— Parol evidence is not admissible to invalidate a promissory note, referring in its terms to an antecedent agreement *ex facie* the note unconditional, by shewing that such agreement was conditional, and its condition unfulfilled. *Keyter* v. *Viljoen* 259

7. ———— Notice of dishonour of a promissory note is not proveable by affidavit in a provisional case. *Anderson* v. *Hutton and another* 259

8. ———— Where it was set up as a defence against a provisional claim on a promissory note that the plaintiffs, with other creditors, had entered into an agreement in writing to give time to the defendant on certain conditions, the plaintiff proposed to call evidence to shew that two of the other creditors had not signed, but was not allowed so to do by the Court. *Searight & Co.* v. *Lawton* 281

9. ———— Affidavit held incompetent to prove indorser's waiver of due negotiation. *Randall's Trustee* v. *Haupt* 281

10. ———— Verity of defendant's signature to a promissory note, if denied, may be proved instanter by parol evidence on the provisional claim. *Norden's Trustee* v. *Butler* 289

11. ———— A secretarial copy admitted, on proof of the signature of the secretary, of a contract which ought to have been among the records of the district of Stellenbosch, but could not be discovered. *Du Toit* v. *Malherbe* 299

12. ———— Certified copies of wills registered with the master are evidence without the production of the registered originals. *Bekker* v. *Meyring* 436

13. ———— Parol evidence is inadmissible, and has in law no effect whatever to invalidate to any extent a will which has been legally executed and has not afterwards been revoked. *Ludwig* v. *Ludwig's Executors* 449

EXCEPTION—Of *inepta cumulatio personarum* (misjoinder), being a dilatory exception, must be pleaded *initio litis*, and is not therefore a ground of absolution from the instance. *Rogerson N. O.* v. *Meyer and another* 38

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EXCEPTION—Of insufficient assignment of breach of condition of bond must be pleaded *initio litis*. *Rogerson, N. O.* v. *Meyer and another* 38

———— of Non-Excussion: *See* EXCUSSION.

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———— of submission to arbitration overruled. *Rens* v. *Bam's Trustee* 89

———— of *non-qualificatie* must be pleaded *in limine*. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* 239

———— of *Non-Qualificatie*: *See* PLEADING.

———— of non-joinder must be pleaded *in initio litis*. *Bekker* v. *Meyring* 436

EXCUSSION—The effect of the renunciation of the *beneficium excussionis* by the surety is that judgment obtained against such surety may be put into execution at once, without first taking in execution the property of the principal debtor. *Maasdorp* v. *Morkel's Executor* 2

2. ———— The renunciation of the exception of excussion by a surety makes him at once liable, although the real property of the principal debtor specially pledged has not been excussed. *Hare q.q.* v. *Croeser* 2

3. ———— It is sufficient excussion of mortgaged property to show, by the confirmed final liquidation account of the principal debtor's estate, and by a certificate from the sequestrator that the debtor had no other property, and that such property had been awarded to a prior preferent creditor; and this notwithstanding a pending appeal by the other creditors regarding the validity and award of such preference. *Ibid.*

4. ———— The effect of the renunciation of the benefit excussion by an "Achterborg" (rear-surety) is destroyed by a clause to pay, if the debtor is unable. *Muller* v. *Meyer* 2

5. ———— A surety under renunciation of the *beneficia* and special hypothec is not entitled to claim previous excussion of the hypothec, this privilege belonging only to "simple sureties;" but he may in execution point out goods of debtor, and insist on their being taken in execution. *Serrurier* v. *Langeveld* 3

6. ———— (Following this case and *Hare* v. *Croeser*.) *Chase* v. *Cloete* 4

7. ———— What is sufficient excussion of a principal debtor. *Rogerson, N. O.* v. *Meyer and another* 38

8. ———— Funds belonging to the principal debtor, but not within the jurisdiction of this Court, cannot be excussed, nor their non-excussion pleaded by sureties in defence. *Ibid.*

9. ———— Non-excussion of principal debtor must be excepted *initio litis*, before joining issue on the merits. *Ibid.*

10. ———— Benefit of non-excussion cannot be pleaded by sureties to the fisc for the collection of the public revenue, such sureties not being entitled thereto. *Ibid.*

11. ———— The excussion of the principal debtor on a penal bond not necessary before proceeding against the sureties. *Ibid.*

12. ———— A surety having renounced the benefit of excussion is not relieved by omission on the part of the creditor, provided his right of action be not impaired. *Van der Byl* v. *Munnik* 73

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EXECUTION—Refused against an executor personally, on a judgment against him as executor, on which judgment execution had issued, and a return of *nulla bona* made. *Jantzen* v. *Van den Bergh* 233

EXECUTOR—Where a provisional judgment had been given on a bill of exchange against a defendant as executor, and execution had been taken out against him in that capacity, and a return of *nulla bona* made, the Court, on further application by the creditor, refused to allow execution to issue on the same sentence with an alteration in its terms against the executor *de bonis propriis*, or to give a new provisional sentence against him personally. *Jantzen* v. *Van den Bergh* 233

2. ———— Whether non-lodgment of a claim on the estate of a deceased person is a bar to creditors claiming from executor still having assets [not decided in this case]. *Horn* v. *Leodolff et Uxor* 457

3. ———— Having distributed the estate, his liability ceases. *Brink* v. *Esterhuizen* 457

4. ———— When a bond stipulates three months' notice, it does not become payable on demand on the debtor's death, but notice must be given to his executors. *Smuts* v. *Haupt's Executors* .. 457

5. ———— Executors dative not having taken out formal letters of registration, not entitled to sue. *Muter & Stone* v. *Spangenberg* 457

6. ———— A surviving spouse appointed executrix under a mutual will, but not yet having acted in that capacity, may decline to act. *Fouche* v. *Fouche's Executors* 458

7. ———— The children of a person deceased (before taking any initial proceedings by action) applied for an interdict to restrain the executors named in a will from administering until the question of the validity of the will had been decided. But the Court refused the interdict, intimating, however, that after summons issued or declaration filed an interdict would be granted on proof of the executors dealing with the estate in a way which might be prejudicial to the interests of any of the parties in whose favour the question might ultimately be decided. *In re Hoets* 459

8. ———— Where an executor overpaid the estate heirs—*Held*, that they were bound not only to recoup to the executor the amount so overpaid, but likewise interest thereon. *Executor of Bantjes* v. *Mostert* 466

9. ———— Where an heir, on attaining majority, gave the executor a receipt and acquittance, but afterwards found that the account framed by the executor, on the basis of which she had been paid, was wrong, and ten years after brought an action to re-open and debate such account on the ground of *læsio enormis*, and her right to *restitutio in integrum*, the account was opened and amended accordingly. *Brand* v. *Neethling's Executor*; *Van Reenen* v. *Neethling's Executor* 467, 470

10. ———— The master of the Supreme Court has such an interest, under section 33 of Ordinance No. 104, in testate and intestate estates, as to require the executor to file accounts; and this on motion, and not by action. [By Act 16 of 1864, this point was legislatively affirmed.] *Master of the Supreme Court* v. *Executors of Van der Poel* 472

11. ———— Where H., S., and S. acted as executors and guardians, and one S. surrendered, and the other S. made a *cessio bonorum*,

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held that H. was entitled to act as sole executor and guardian. *In re Wicht* 473

12. EXECUTOR—Executors having funds in hand are liable to creditors, although such creditors had not lodged their claims in due time, as required by sections 30 and 32 of Ordinance No. 104. *Moore's Executrix* v. *Le Sueur* 475

13. ———— Where the defendant, as executor, had given notice to creditors to lodge claims in terms of section 30 of Ordinance No. 104, and the plaintiff had lodged his claim, *held* that the plaintiff was entitled to claim payment of his bond without giving the usual notice. *Southey* v. *Dormehl's Executor* 476

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FEES: *See* ATTORNEY.

FIDEI-COMMISSUM—Where the executor of a fidei-commissary estate and guardian of the fidei-commissary heirs, handed over the fidei-commissary estate to the fiduciarius, taking a bond from him in security—*Held*, that this was a *novatio debiti*, and destroyed the tacit hypothec antecedently possessed by the fidei-commissarii on the estate of such fiduciarius. *In re Lutgens* .. 312

2. ———— Registration of a *fidei-commissum* not necessary to entitle it to a hypothec. *Ibid.*

3. ———— A *fidei-commissum* is not revocable by surviving spouse contrary to the terms of the mutual will. *Lutgens' Trustees* v. *Lutgens' Executors* 394

4. ———— The legitimate portion is claimable absolutely, notwithstanding a *fidei-commissum* over the whole inheritance. *Sandenberg* v. *Executors of Zibee* 427

FIDEJUSSORES INDEMNITATIS—Who are not. *Rogerson N. O.* v. *Meyer and another* 38

FISC—Sureties to the fisc for the collection of the public revenue are not entitled to the *beneficium excussionis*, and therefore cannot plead the exception of non-excussion. *Rogerson N.O.* v. *Meyer and another* 38

2.—Sureties to the fisc (not being *fidejussores indemnitatis*, and not being entitled to the *beneficium excussionis*) are not discharged from their obligation where the creditor does not cause the bond to be immediately put in suit against the defaulting principal debtor, even though the sureties have thereby suffered loss, or though during such *mora* the principal debtor has become insolvent. *Ibid.*

FRAUD—A sale on a fictitious invoice set aside as fraudulent. *Farmer* v. *Executors of Durham* 97

GENERAL ISSUE—*Læsio enormis* is not proveable under the general issue, but must be specially pleaded. *Executrix of Durr* v. *Rens* 101

————, DEFENCE UNDER PLEA OF: *See* PLEADING.

GENERAL PLAN—A purchaser at a sale of landed property, one of the conditions of sale being that "the purchaser shall pay the expenses of the diagrams"—*Held*, not liable to pay the expenses of a general plan of the estate sold. *Executor of Batt* v. *Maynard* 136

GOVERNMENT—How far *dominus fluminum*, and how far of rivulets [no decision]. *De Wet* v. *Cloete* 291

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2. GOVERNMENT—The government is preferent on the insolvent estates of auctioneers for the amount of the government auction dues received by them and not duly paid. [*Sed vide* Act 4 of 1861.] *In re Wolff and Bartman* 322

GREEN POINT MUNICIPALITY: *See* MUNICIPALITY.

GUARANTEE—A letter from A. directing B. to furnish C. with goods, in conjunction with a bill drawn by C. on A. in favour of B.—*Held*, insufficient for provisional sentence against A. *Ebden, Houghton, & Co.* v. *De Villiers* 1

———— OF SURETIES TO EACH OTHER: *See* SURETY.

2. ———— Letter of guarantee, how far binding on guarantor. *Eager* v. *Clarke and another* 15

3. ———— S., the defendant, agreed, for the credit of C., to accept a bill for the price of certain goods sold and delivered to C. by the plaintiffs, O. U. & Co. The only evidence of the nature of the undertaking entered into by S. was to be found in a passage of his letter to C., in which he says, "and lastly, to show that I was not afraid, and to keep up your credit, I agreed without condition to accept for you for the amount of the goods this day put out for you."—*Held*, that this did not amount to an absolute and unconditional guarantee to pay to plaintiffs the price of the goods when it became due, if not then paid by C., but was merely an agreement to accept a bill in favour of plaintiffs for the price. That even although under this agreement plaintiffs might have been entitled to call on defendant to accept not merely a bill drawn on him by C. in their favour, but to accept a bill for the price drawn on him by plaintiffs, yet this obligation was qualified by the necessarily implied condition that a bill should be presented for acceptance in due time. That as plaintiffs had not so presented any such bill to defendant, or called on him to accept it, until after they had taken from C. a promissory note signed by C. alone, in payment of the price of the goods, they had no right now to call on defendant in virtue of his agreement with them, to which agreement they had by their own act put an end. *Openshaw & Unna* v. *Stoll* 76

4. ———— Where an agent gave an undertaking in these terms: "As agent for D. & B. P., the following acceptances which you hold of them at maturity will be paid by me." *Held*, by the majority of the Court, that this was an undertaking binding the agent personally. *Elliott* v. *Albertus and McDonald* v. *Albertus* 180, 183

GUARDIAN AND WARD—Minor's hypothec on property of guardian. *In re Liesching* 329

2. ———— A widow re-married out of community of property is under the legal guardianship of her second husband. *Prince q.q. Dieleman* v. *Anderson* 393

HUSBAND—Consent of husband, when spouses are married in community of property, necessary to bind wife. *Executors of Morkel* v. *Heirs of Morkel* 6

HYPOTHEC—The legal hypothec enjoyed by the Government of this colony upon the property of collectors of the revenue, is not diminished or impaired by the Government taking sureties from such collectors. *In re Insolvent Estate of Buissinne*; *Van der Byl* v. *Sequestrator*; *Croeser* v. *Sequestrator*.. .. .. .. 4, 309, 310

2. ———— No conventional special hypothec can be constituted

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over immoveable property except by writing *coram lege loci*. *Harris* v. *Trustee of Buissinne* 105

3. HYPOTHEC—*Kusting Brieven*, and also special conventional mortgages for purchase-money, or money lent for payment of purchase-money, or mortgage taken over, when constituted *simul ac semel* the transfer of the property mortgaged, are privileged and preferent to prior tacit or legal hypothecs. *Van der Byl and another* v. *The Sequestrator and another* 309

4. ———— A tacit or legal hypothec, created by instructions not promulgated, is of no force. *Vendue Commissaries* v. *Brink* .. 309

5. ———— There is no legal preference on goods sold at vendue. *Ibid.*

6. ———— The hypothec of the fisc on the estate of *pachter* refused. *Commissaries of Vendue* v. *Sequestrator; Osmond and another* v. *Van Reenen and another* 309, 312

7. ———— Preference of vendue commissioner by instructions of 1793 refused. *Commissaries of Vendue* v. *Sequestrator* .. 309, 310

8. ———— The legal hypothec of government upon the property of collectors commences from the date of appointment of such collectors. *Croeser* v. *Sequestrator* 310

9. ———— Hypothec of fisc for taxes. *Commissary of Vendue* v. *Sequestrator; Osmond and another* v. *Van Reenen and another* 310, 312

10. ———— Prior general hypothec preferent to a subsequent special hypothec of moveables, of which no delivery has been made. *Sequestrator* v. *Thomson and another* 311

11. ———— Prior *pignus prætorium* preferent to posterior special hypothec. *Blanckenberg* v. *Guardians of Lond* 311

12. ———— Minors not entitled to preference on bonds in their favour, granted by a person not their guardian. *Ibid.*

13. ———— General hypothec not lost by discharge of special. *Watermeyer* v. *Heckroodt and another* 311

14. ———— *Pignus prætorium* not destroyed by surrender of estate within twenty-eight days. *Meinert* v. *Nisbet & Dickson* 311

15. ———— Hypothec of landlords on *invecta et illata* preferent, without attachment, as to property actually remaining in the landlord's house, to *pignus prætorium* (*i.e.* judicial arrest by the messenger of the magistrate's Court). *Scheuble* v. *Van der Berg and another* 311

16. ———— *Pignus prætorium*, constituted by attachment, is equivalent to *pignus mobilium* completed by tradition, and is preferent to *pignus tacitum vel legale et generale* of prior date. *Cloete* v. *Colonial Government* 312

17. ———— Where the executor of a fidei-commissary estate, and guardian of the fidei-commissary heirs, handed over the fidei-commissary estate to the fiduciarius, taking a bond from him in security, *held* that this was a *novatio debiti*, and destroyed the tacit hypothec antecedently possessed by the fidei-commissarii on the estate of such fiduciarius. *In re Lutgens* 312

18. ———— Registration of a fidei-commissum not necessary to entitle it to a hypothec. *Ibid.*

19. ———— Question as to the value of special hypothec of the "opstal" of a loan place in competition with the special hypothec

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of the place after its conversion into a quit-rent place, entertained but not decided by the Court. *Van Reenen* v. *Reitz and another* .. 316

20. HYPOTHEC—A medical man has no preference for medicines supplied to an insolvent, alive when his estate was sequestrated, for any period prior to the sequestration. *Ryneveld* v. *Juritz* 318

21. ———— An attorney employed by an executor to recover a debt due to the testator's estate has a preference on the amount of the judgment in the sheriff's hands for his costs of this action, but has no preference for his account against the executor for other business done not in connection with the testator's estate. *Thomas* v. *Barker* 321

22. ———— The colonial Government held to be preferent on the insolvent estates of auctioneers for the amount of the Government auction dues received by them and not duly paid. (*Sed Vide* Act No. 4 of 1861). *In re Wolff & Bartman* 322

23. ———— An anterior conventional general hypothec is not preferent to the posterior tacit general hypothec of the Government over receivers of the public revenue. *Cloete* v. *Colonial Government* 325

24. ———— Hypothec allowed on Church property for moneys expended in its erection. *Executor of Bohmer* v. *Churchwardens of the Roman Catholic Chapel and others*.. 325

25. ———— Hypothec of minor on property of co-guardians postponed until after the excussion of the administering guardian. *In re Liesching* 329

26. ———— Lien claimed by a bookkeeper on the books of his insolvent employer, for moneys lent and advanced, refused. *Spangenberg's Trustee* v. *Cousins* 343

27. ———— A workman in a waggonmaker's shop has not the preference for wages to which a domestic servant is entitled. *Mulder* v. *Creditors of Lacable*.. 348

28. ———— *Quære*, whether seamen have any right of hypothec for wages over the proceeds in the sheriff's hands of a ship sold in execution. *In re The Black Swan* 350

29. ———— Children in a foreign country, minors according to the laws of that country as well as of this colony, *held*, entitled, equally as minors in the colony would be, to a tacit hypothec on the estate of the administering guardian for the amount of a legacy under their grandfather's will, the interest of which was during their father's lifetime payable to him. *In re Sandenbergh* 353

30. ———— A. became a tutor of minors in 1827. In 1829 he became the purchaser of property then burdened with four special mortgages. The first in favour of V. d. P.; the second and third in favour of V. d. B., and the fourth in favour of P.; altogether amounting to £1200. In 1830, A. received transfer, and *pari passu* and *simul ac semel* granted four bonds to the mortgagees in lieu of the four bonds in their favour which had been granted by A.'s vendor and which were then cancelled. In 1837 it was agreed between A. and V. d. P. that the latter should pay off all the mortgages and advance him a further sum of £550, A. executing a bond in his favour for £1750. This was done. On A.'s evidence the Court held that V. d. P. was entitled to preference before the minors, who had a tutorial hypothec for the amount of £1200, the bond to that extent representing and coming in the

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place of the four bonds existing at the time of the transfer to A., which would have been entitled to preference before the tutorial hypothec. It was admitted that in respect of the loan of £550 the tutorial hypothec had preference before the special mortgage to that amount. *In re Blommestein* 360

31. HYPOTHEC—A notarial deed duly registered, acknowledging a debt, and for the securing thereof purporting to assign, &c., the debtor's right, title, and interest in a farm, and agreeing that in case of non-payment, the said firm, &c., shall and may forthwith be made and declared executable, constitutes no valid hypothec whatever on the farm. The debtor's interest in the farm, however, is executable in a judgment on such a notarial bond. *Executors of M'Kenney* v. *Rorke* 366

32. ———— The Court refused to try, on motion, the right of a creditor to retain, as against the trustees of an insolvent estate, the title-deeds of land deposited with the creditor in security of a debt due to him. *Trustees of Randall* v. *Norden* 368

33. ———— A deed, in which, among other things, title-deeds of a house were deposited in pledge with the plaintiffs, provided *inter alia* that it should be lawful for the plaintiffs to receive the rents, &c., if any, accruing on the title-deeds and other securities:—*Held*, that this had the effect of creating an assignment of the rents of the house in favour of the plaintiffs, which was not defeated by a deed of assignment to which the plaintiffs were parties conveying the debtor's estate to trustees in trust for creditors. *Phillips & King* v. *Trustees of Norton* 369

34. ———— Whatever may be the legal effect of a deposit of title-deeds in security of a debt, in a deed to which the creditor was a party, conveying the debtor's estate to trustees in trust for creditors, a clause by which creditors holding securities agreed to deposit the securities with the trustees for the purpose of realization "on the special trust and confidence that the respective proceeds shall be paid over to the extent of their several and respective preferences by virtue thereof," in virtue of which the title-deeds deposited with the creditor were actually delivered over, constituted a transaction by which it was stipulated that the creditor should have a first preference over the proceeds of the land held upon the title-deeds. *Ibid.*

35. ———— Where by the law of the colony a hypothec has been acquired affecting property of an English bankrupt within the jurisdiction of the Supreme Court the hypothec can be made effectual by an action in this Court. Notwithstanding the English bankruptcy, the Court has jurisdiction to try whether a hypothec claimed by the creditor had been acquired over any of the bankrupt's property situated within the Court's jurisdiction prior to the bankruptcy. *Nordon* v. *Solomon qq. Assignees of Charke* .. 377

36. ———— Hypothec on a ship for advances made for repairs and for furnishings. *Ibid.*

37. ———— The municipality of Green Point has not under Ordinance No. 4, 1839, any preference for arrears of road rates. *Municipality of Green Point* v. *Powell's Trustees* 380

38. ———— The pledgee of a bond, pledged by writing, and delivered to him in security of a sum specified in the writing, has no *jus retentionis* of the bond against the creditors of the pledgor in respect of any other debt due by him to the pledgee. *Brink's Trustees* v. *S. A. Bank* 381

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IMMOVEABLE PROPERTY—At the Cape, having been sold in London under a notarial agreement entitling transfer to be made at the Cape, the registrar of deeds here was directed to allow transfer accordingly. *In re Twycross & Jennings* 88

2. ———— The *dominium* of immoveable property can be conveyed only by transfer before the registrar of deeds. *Harris* v. *Trustee of Buissinne* 105

IMPRISONMENT: *See* CIVIL IMPRISONMENT.

INDEMNITY—A surety to a bond, who has paid the debt due by the principal debtor, and has obtained cession of the bond from the creditor, cannot sue provisionally on a deed of indemnity by the defendant, holding him, the surety, harmless in case of such payment, the payment being incapable of proof without evidence extrinsic of the deed of indemnity. *Cloete* v. *Eksteen* 20

INSANITY—An order of Court, made *ex parte* and without evidence as to the state of mind, placing a person alleged to be imbecile under curatorship, is null and of no effect as regards a will made by the person so placed under curatorship. *Van der Spuys* v. *Maasdorp* 420

2. ———— How a person under curatorship by reason of insanity should proceed, if, during a lucid interval, he desire to make a will. *In re Kemp* 435

3. ———— Will set aside and declared null, illegal, and void, on the ground that the testator, at the time he executed the said will, was not in his sound and proper senses, and was legally incompetent to execute any will. *Bekker* v. *Meyring* 436

INSOLVENCY—Of principal debtor purifies condition as to notice to surety. *Board* v. *De Villiers* 55

2. ———— On the insolvency of a debtor, a deed of *kinderbewys* held entitled to be ranked before a bond to a creditor. *In re Kotzé* 67

3. ———— To secure preference on the estate of a surety on his sequestration, there must be a separate and distinct register of the bond in the name of the surety as well as of the principal debtor. *Ibid.*

4. ———— On the order of the sequestration of the vendor's estate, the *dominium* of the immoveable property sold by him, but not transferred *coram lege loci* to the purchaser, vests in the Master of the Supreme Court, and ultimately in trustees, for the benefit of creditors. Part of the purchase price having been paid by the purchaser to the vendor, the purchaser has a personal claim against the estate for damage sustained by non-fulfilment of the vendor's undertaking to perfect the sale by making legal transfer, and for restitution of the price paid; and is entitled for such personal claim to be ranked concurrently with the other personal creditors of the vendor, but has no right of preference whatever. *Harris* v. *Trustee of Buissinne* 105

5. ———— The purchaser of immoveable property, who has not obtained transfer before the surrender of the estate of the seller as insolvent, cannot by law compel the seller's creditors to give him transfer of the property purchased, although he may previously have paid the whole of the stipulated price to the seller, or may offer to do so to the creditors. *Trustee of Smith* v. *Norden* 128

6. ———— A vendor, who had not the *dominium* of a farm, but

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a *jus ad rem*—a right to claim conveyance—having sold the farm, or, in law, his right to the farm, and the purchaser having receiving actual possession of the land, and the vendor having thereafter surrendered his estate as insolvent, without having obtained transfer *coram lege loci, held* that the trustee of his insolvent estate was bound to effect transfer in favour of the purchaser. *Van Aardt* v. *Hartley's Trustees* 135

7. INSOLVENCY—Mandatores, creditors in insolvency, *held* liable for the expenses of the mandate each *pro ratâ* his own share only, and not to make good the shares of insolvent mandatores. *Chiappini* v. *George* 179

8. ———— On the insolvency of a factor, his principal is entitled to vindicate as his own property all his goods which at the date of the insolvency are in the factor's possession; and also the proceeds of all such goods which may have been sold by the factor, though the factor may have taken in payment therefor bills in his (the factor's) own favour. The principal may also sue for the unpaid price of goods sold by the factor in his own name. *Chiappini & Co.* v. *Jaffray's Trustees* 192

9. ———— The insolvency of the holder, who was also the payee, of a bill of exchange, after the drawing of the bill, *held*, notwithstanding his subsequent rehabilitation, a good defence against a provisional claim on the bill, no assignment having been made to him by his creditors under the sequestration. *Barry* v. *Bailey* 231

10. ———— An uncertificated insolvent may be a mandatory. *Silberbauer q.q. Davis* v. *McDonald & Sutherland* 184

11. ————It is (by the provisions of Ordinance No. 64) a defence against a provisional claim on a promissory note that the payee, who had endorsed the note, was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. [But by Ord. No. 6, 1843, s. 126, such indorsation is good if made after the confirmation of the account and plan of distribution.] *Smith* v. *Campbell* 260

12. ———— O., an uncertificated insolvent, carried on business after his insolvency, with the knowledge, although not with the express permission, of his trustees, and sold goods to C., who knew of his insolvency. C. paid O. with two notes in his favour *or order*. O. endorsed the notes to S., who also knew of the insolvency. Subsequently S. took from C. directly, without O.'s name thereupon, two other notes in lieu of the first-mentioned notes, and now sued C. on one of them. C. pleaded no consideration; but *held*—that the delivery up of the first two notes was sufficient consideration to found this action. It would seem that if S. had sued on the notes originally given, it being proved that the insolvent had given valuable consideration for them, S. would have successfully maintained the action, even although the trustees had intervened and claimed on the notes. *Stretch* v. *Campbell* 261

13. ———— *Pignus prætorium* not destroyed by surrender of estate within twenty-eight days. *Meinert* v. *Nisbet & Dickson* .. 311

14. ———— An uncertificated insolvent, Ordinance No. 64 being then in force, purchased immoveable property, which was mortgaged by the vendor to A. for 925*l*. In order to enable the vendor to effect transfer, the plaintiff paid off the mortgage, and the

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insolvent, on receiving transfer *simul ac semel* and *pari passu* executed a bond in plaintiff's favour for the amount. The trustee of the estate claiming to have the house sold, the plaintiff claimed that he should be allowed to prove his bond in the sequestration. The master refused to admit the proof, the debt having been contracted subsequently to the sequestration. The Court confirmed the master's decision. Thereafter, in an action brought for that purpose against the insolvent's trustee, the Court declared the mortgage in plaintiff's favour a valid and effectual hypothec over the house. *In re Magodas* 344

15. INSOLVENCY—The Supreme Court has jurisdiction to declare and make effectual a hypothec over property within this colony forming part of the estate of an English bankrupt. *Norden* v. *Solomon q.q. Assignees of Charke* 377

16. ———— K. married S. in community. By mutual will they bequeathed to their sons certain farms, to devolve upon them on the death of the longest liver, who was to enjoy the usufruct. The wife died, the husband re-married, and enjoyed the usufruct until his death, after which event the second estate was surrendered. The trustees in the insolvency refused transfer to the sons of the first marriage on the ground that the farms had come into the second community. But the Court ordered transfer, and condemned the trustees personally in costs. *Kotzé* v. *Kotzé's Trustees* 414

17 ———— Where H., S., and S. acted as executors and guardians, and one S. surrendered and the other S. made a *cessio bonorum, held*—that H. was entitled to act as sole executor and guardian. *In re Wicht* 473

INSTRUCTIONS OF 1793—Do not secure preference to vendue commissioner. *Commissaries of Vendue* v. *Sequestrator* 309

INTEREST—Sureties held liable in interest from the date of the obligation of the principal debtor, and not merely from the date of demand upon them; a tender only *a tempore litis contestatæ* therefore held insufficient to carry costs. *Du Toit's Trustees* v. *Smuts's Executors and another* 24

2. ——— Evidence allowed of the custom of trade as to payment of interest on mercantile transactions. *Fraser* v. *Norton & Co.* .. 212

3. ——— Interest on an English promissory note not specifying place of payment, is calculated according to the rate of interest due in England, and is reckoned until the date of payment in the colony, and not until the date of receiving the capital in England. *Phillips & King q.q. Porcia* v. *Farmer* 287

4. ——— The holder of a mortgage bond is entitled to preference, on the debtor's sequestration, not to full arrears of interest which may be due on the bond, but only to interest for one year and the current year. *Cloete* v. *Aling* 318

5. ——— Where the balance of a maternal inheritance was sued for and judgment obtained therefor, the Court allowed interest to be reckoned only from the date of summons, holding the father to have been a *bonâ fide* possessor during the interval, and therefor not liable for interest *percepta et consumpta ante litem constitutam. Cleeuweek* v. *Bergh* 396

6. ——— Where a widow was entitled to the usufruct of the inheritance of a minor child, but had allowed the interest of the

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inheritance to accumulate in the hands of the Master of the Supreme Court as the minor's guardian and administrator, *held*—that the plaintiff, who had married the widow in community, and who had also for several years after his marriage with her allowed the interest to accumulate as before, was entitled to the interest accumulated both before and after his marriage, as being property of the community. *De Smidt* v. *Burton, N.O.* 401

7. INTEREST—Where an executor overpaid the estate heirs, *held*—that they were bound not only to recoup to the executor the amount so overpaid, but likewise the interest thereon. *Executor of Bantjes* v. *Mostert* 466

INTESTACY—The share of an inheritance devolving upon a child, his father being dead, distributed, on the death of such child a minor, intestate, one half to his mother and the other half equally between his brothers and sisters of the full blood. *Bresler* v. *Kotzé's Executors* 444

2. ———— The North Holland law, including the Political Ordinance of the States General of 1st April, 1580, and the Interpreting Ordinance of 13th May, 1594, is the law of this colony in intestate succession. *Spies* v. *Spies* 454

INVOICE—A sale through a broker of certain ironmongery on an invoice afterwards repudiated, where on evidence it appeared that the articles had been in store for a long time, and that the invoice was, in this respect, a fictitious one, set aside, the Court holding that the intended purchase was one of an original invoice of goods freshly imported. *Farmer* v. *Executors of Durham* 97

2. ———— Plaintiffs sold to defendants, through a broker, 184 chests Canton Bohea, to sample, at 9*d.* per lb., as per invoice, and 264 chests Fokeen Bohea, in the same way, at 1*s.* Samples were shown, sale completed, and invoices delivered. There was no mention of the F. B. in the invoices. Defendants tendered 9*d.* per lb. all round. Plaintiffs insisted on 1*s.* for the F. B., or a relinquishment of the sale. Defendants then took delivery without mention of price. The Court found the 264 chests to be Fine Canton Bohea worth 10*d.* per lb.; that the defendants had bought on faith of sample and warranty combined, had taken delivery of the 264 chests under the plaintiff's warranty that it was F. B., and were entitled, on discovering it was not, to refuse to pay for it as such. It therefore absolved defendants from the instance, but suggesting that on an action for F. C. B. at 10*d.* per lb. plaintiffs would recover, judgment was taken by consent for 9*d.* for C. B. and 10*d.* for F. C. B. *Waters & Herron* v. *Phillips & King* 99

JUDGMENT—A judgment obtained against an office-holder, for a deficiency in the accounts of his office, on his admission made in an action to which his surety was no party, is not evidence sufficient to warrant provisional sentence for the amount of such deficiency against the party who had bound himself as surety for any deficiency which might be caused by the default of such office-holder. *Sutherland* v. *Snell* 7

————, CONFESSION OF: *See* CONFESSION.

JUDICIAL NOTICE—The Court is bound judicially to take notice of a British statute for India, and of letters patent issued thereunder. *Livingston, Syers & Co.* v. *Dickson, Burnie, & Co.* .. 239

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JURISDICTION—Of Supreme Court: *See* Supreme Court.

JUS AD REM—To a farm having been sold, and possession of the land actually delivered before insolvency, the seller having surrendered his estate before he had obtained transfer *coram lege loci*, entitles the purchaser to transfer in his favour from the trustee of the insolvent estate. *Van Aardt* v. *Hartley's Trustees* 135

JUS IN RE—Not given by a bill of sale without delivery of the moveables sold. *Robertson* v. *Sequestrator* 88

2. ———— Sale, followed by possession, of immoveable property does not transfer the *jus in re*. It can be conveyed only by transfer *coram lege loci*. *Harris* v. *Trustee of Buissinne* 105

3. ———— The *jus in re* to a vessel sold and delivered passes only on compliance with the requisites of the Registry Acts. *Terrington* v. *Simpson* 110

JUS RETENTIONIS—Of mortgagor against mortgagee, available to enforce performance of reciprocal obligations constituted by mutual agreement; also of force against pledgee of mortgage bond. *Woutersen's Executors q.q. Palmer* v. *Nisbet & Dickson* .. 310

2. ———— A bond pledged in security of a sum specified does not give the pledgee any right as against the creditors in insolvency of the pledgor in respect of any other debt due by him to the pledgee. *Brink's Trustees* v. *South African Bank* .. 381

KINDERBEWYS—Preference secured by a deed of *kinderbewys* on an insolvent estate. K. in 1812 (being married in community to Mrs. K.) passed a bond in favour of L. for 250*l*. Mrs. K. died in 1818. In 1820, before his second marriage, K. executed a deed of *kinderbewys*, for the maternal portions of the children of the first marriage. Afterwards he surrendered. The trustee of his estate ranked the *kinderbewys* preferent to L.'s bond. It was objected for L. that the bond in his favour, being an obligation on the first joint estate, the children of the first marriage were liable to him for 125*l*. being half the bond, and to that extent should be ranked posterior to him. *Held*—that whatever claim L. might have against the children by action, if so advised, he was not entitled in the distribution of K.'s estate to any preference under the bond and over the *kinderbewys*. The plan of distribution confirmed accordingly. *In re Kotzé* 67

2. ———— A widow remarried out of community of property, *Held*—Incompetent, her second husband objecting, to appear in Court and confess judgment for the amount of *kinderbewys* executed before such second marriage. *Prince q.q. Dieleman* v. *Anderson* 393

3. ———— Relief granted to surviving spouse from effects of error in calculating *kinderbewys*, in which there had been entered the value of a slave who was afterwards declared by the Privy Council to have been free. *Prince q.q. Dieleman* v. *Berrange* .. 393

KUSTING BRIEVEN—Are preferent to prior tacit or legal hypothecs. *Van der Byl and another* v. *Sequestrator and another* .. 309

2. ———— Special conventional mortgages, although for purchase-money, but not constituted *simul ac semel* with the transfer, not entitled to the privilege of *Kusting Brieven*. *Croeser* v. *Sequestrator and another* 310

LANDDROST AND HEEMRADEN—Decree of: *See* Water Rights.

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LÆSIO ENORMIS—Must be specially pleaded. Where there had been a verbal contract of sale:—*Held*, that under the general issue it was not competent to lead evidence to shew that the price stipulated for was less than one-half the real value of the property, or to claim that the sale should be set aside on that ground. Evidence as to the inadequacy of the price had only been admitted as proving a circumstance in the case tending to show the improbability of such a sale as alleged. *Executrix of Durr* v. *Rens* .. 101

LEASE—Where a lease was entered into with a minor, assisted by his mother, not his legal guardian:—*Held*, (Menzies, J., *diss.*), that the defence of minority was sufficient to bar provisional sentence on a claim for rent. *Gantz* v. *Wagenaar* 162

2. ——— Construction of clause in lease as to term of holding after a sale. *Dick* v. *Hiddingh* 162

3. ——— Production of lease sufficient to entitle the lessor to claim provisional sentence for rent. *Neethling* v. *Taylor* 162

4. ——— Where a lease contained a clause giving the lessee the right to purchase during occupancy:—*Held*, that according to the true construction of the lease, the lessee's right to purchase ceased the instant the lessor gave notice that the agreement was to terminate. *Biddys* v. *Ward* 162

6. ——— An agreement by which the lessor of property makes over, cedes, transfers, and alienates for a term the rent of the property let, gives the cessionary a title to sue for such rent. The lessee is entitled to compensate against the claims for rent due prior to the cession all liquid claims due by the cedent to the lessee before the cession; but as regards rents coming due after notice of the cession, he cannot compensate debts due to him before the cession. *Smith* v. *Howse* 163

7. ——— Tacit relocation of a house originally let for a year, rent payable monthly, is a relocation from month to month. Acceptance of notice to quit and treaty for a new lease is an abandonment of right of tacit relocation. *Victor* v. *Courlois* 165

8. ——— Where a landlord gives a tenant a certain time to determine whether he will take a new lease, and before the lapse of that time validly lets the house to a third party, the former tenant cannot keep possession, but may have an action for damages against the landlord for breach of contract. *Ibid.*

9. ——— Parol lease followed by possession, paramount to subsequent written lease. *Herbert* v. *Anderson* 166

10. ——— Writing not necessary to the validity of leases of urban tenements, followed with possession, even when the term is a year. *Ibid.*

11. ——— An action is maintainable by the tenant against the landlord for damages sustained by reason of the landlord's failure to fulfil the condition of keeping the premises in tenantable repair. The landlord may, in reconvention, claim arrear rent. *Smith* v. *Groenewald* 168

12. ——— Provisional sentence granted on an underhand contract of lease. The lessor need not prove the lessee's possession under the contract. *Truter* v. *Everest* 169

13. ——— The allegation of unliquidated damages for want of repairs is no defence to a provisional claim for rent on a lease; but if the lessee can make out a *primâ facie* case to the satisfaction of the

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Court that in the principal case he will be able to prove damages, that will be a bar to a provisional sentence. But proof that the repairs require a certain amount of money to be expended is no criterion that the lessee has sustained a corresponding amount of damage by failure to repair. *Vowe* v. *Pedder* 169

14. LEASE—The placaat of 9th May, 1744, not being law in this colony, it is therefore unnecessary to register or pay transfer duty on a lease for ninety-nine years. *Maynard* v. *Usher* 170

15. —— A tenant is entitled to reduction of rent for loss of beneficial occupation caused by the Queen's enemies. *Rubidge* v. *Hadley* .. 174

LEGITIMATE PORTION—A widow, Z., appointed her daughter, Z., married to plaintiff, her sole heiress, subject to a *fidei commissum* that the daughter should enjoy only the interest during life, and that on her death the interest should go to—1, the plaintiff; 2, the children of her daughter; and on their death the capital to be divided among her daughter's grandchildren. Plaintiff, in right of his wife, claimed her legitimate absolutely, and interest on the balance during life, which the Court awarded. *Sandenbergh* v. *Executors of Zibee* 427

LETTERS OF ADMINISTRATION—The Master should not withhold letters of administration under a will under Ord. No. 104, sect. 20, on objection being taken that the heirs intend to have the will set aside for want of due solemnities. *In re Hoets* .. 459

LIEN: *See* HYPOTHEC.

LIQUIDATION ACCOUNT—Of a joint estate, allowed, after the death of the survivor, to be re-opened, and the executor of such survivor held entitled to impeach the account, as based on an erroneous construction of the will. *Reis* v. *Executors of Gilloway* 401

2. —— A liquidation account allowed to be re-opened and ordered to be amended, where an heir, on attaining majority had given the executor a receipt and acquittance, but afterwards found that the account framed by the executor, on the basis of which she had been paid, was wrong, and ten years after majority brought an action to re-open and debate such account on the ground of *lœsio enormis* and her right to *restitutio in integrum*. *Brand* v. *Neethling's Executor*; *Van Reenen* v. *Neethling's Executor* 467, 470

3. —— The Master may, by motion, require the executor to file accounts. *Master of the Supreme Court* v. *Executors of Van der Poel* 472

LOAN-PLACE—Effect of special mortgage of the opstal of a loan-place [not decided.] *Van Reenen* v. *Reitz and another* 316

LOCATION: *See* LEASE.

MANDATE: *See* AGENT; POWER OF ATTORNEY.

MARRIAGE—Re-marriage of widow, survivor, though out of community, places her under her second husband's legal guardianship. *Prince q.q. Dieleman* v. *Anderson* 393

2. —— Re-marriage in community of surviving husband does not affect the validity of mutual will made by such husband and his previous spouse. *Ludwig* v. *Ludwig's Executors* 449

MASTER OF THE COURT—The originals of wills must be enregistered with the master; and if more wills than one by the same

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testator be offered, the master is bound to enregister the same, leaving the question of their relative validity to be decided by the Court on action. *In re Herron* 423

2. MASTER OF THE COURT—Power of, to withhold letters of administration under sect. 20 of Ordinance No. 104. *In re Hoets* .. 459

3. ——— The master has, under sect. 33 of Ord. No. 104, such an interest in testate and intestate estates, as to require the executor to file accounts. And this on motion, and not by action. *Master of the Supreme Court* v. *Van der Poel* 472

MEDICINES—A medical man has no preference for medicines supplied before insolvency to an insolvent alive when his estate was sequestrated. *Ryneveld* v. *Juritz* 318

MINOR—Where for certain reasons, immoveable property bought by the father, was transferred to "W. A. as father and natural guardian of and in trust for his minor son, J.A." and it was proved that the son never was intended to have, and had not, any beneficial interest, the Court decreed that the deed of transfer should be set aside, and ordered transfer to be effected in favour of the father. *Assue* v. *Curator of Assue* 148

3. ——— Minority held a sufficient defence (Menzies, J., *diss.*), against a provisional claim on a lease entered into by a minor with the assistance of his mother, not his legal guardian. *Gantz* v. *Wagenaar* 162

3. ——— Minors not entitled to preference on bonds in their favour, granted by a person not their guardian. *Blanckenberg* v. *Guardians of Lond* 311

4. ——— Children in a foreign country, minors according to the laws of that country as well as of the colony, *held*, entitled equally as minors in the colony would be, to a tacit hypothec on the estate of their administering guardian. *In re Hercules Sandenbergh* .. 353

5. ——— Special mortgages on property purchased by a tutor, such debts being taken over by the purchaser, entitled to preference before the prior tacit tutorial hypothec of the minors. *In re Blommestein* 360

MIS-JOINDER—Exception of mis-joinder being a dilatory exception, must be pleaded *in initio litis*, and is not therefore a ground for absolution from the instance. *Rogerson, N. O.* v. *Meyer and another* 38

MORA—No *mora* on the part of the creditor, although during such *mora* the debtor becomes insolvent, discharges sureties who are not entitled to the *beneficium excussionis*. *Rogerson, N. O.*, v. *Meyer and another* 38

2. ——— The purchaser of a lot of wine not *in morâ* for not ascertaining the quality before delivery of the whole quantity is completed. *Murray* v. *De Villiers* 88

MORTGAGE—Non-registration of special mortgage discharges surety. *Rousseau* v. *Bierman* 5

2. ——— Although a mortgage be annulled and set aside as an undue preference under Proclamation of 6th September, 1805, the surety is not released. *Nisbet & Dickson* v. *Thwaites* 5

3. ——— It will not bar objection of nullity of a mortgage bond in respect of want of due registration, that the sureties to another bond duly registered had, by a clause in such latter bond, declared themselves satisfied with the mortgage contained in the former and unregistered bond. *Meyer* v. *Denys* 6

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4. MORTGAGE—Non-registration of special mortgage discharges surety although co-principal debtor. *Kotze* v. *Meyer* 6

5. ———— Surety to general mortgage bond released by creditor's non-registration of the bond. *Meyer* v. *Low*; *Watermeyer q.q.* v. *Theron and another* 8, 14

6 ———— Surety to general mortgage released by creditor's non-registration on the estate of the debtor, who afterwards surrendered. The fact that the debtor's estate had not yet been liquidated at the time of action brought made no difference in the principle to be applied. *Borcherds* v. *Onkruyt* 59

7. ———— The amount of a mortgage bond over property purchased at public auction by the bondholder, offered in compensation, is a good defence to a provisional claim (on the conditions of sale) for the first instalment of the purchase-money of the property so purchased. *Eaton, N. O.* v. *Johnstone* 89

8. ———— A bond in which the obligor undertakes to pay the purchase-money of land on transfer being given, is a sufficiently liquid document; the summons should tender such transfer forthwith. *Vouchee* v. *Van Ellewee* 99

9. ———— Delivery of articles hypothecated is necessary to make effectual special mortgage of moveables. *Smuts* v. *Stack and others* 309

10. ———— *Kusting Brieven*, and also special conventional mortgages, for purchase-money or money lent for payment of purchase-money, or mortgage taken over, when constituted *simul ac semel* the transfer of the property mortgaged, are privileged and preferent to prior tacit or legal hypothecs, and this without being necessarily constituted in the deed of transfer itself. *Van der Byl and another* v. *Sequestrator and another* 309

11. ———— Special conventional mortgages, although for purchase-money, but not constituted *simul ac semel* (*i.e.*, on the same day) with the transfer, not entitled to the privilege of *Kusting Brieven*. *Croeser* v. *Sequestrator and another* 310

12. ———— Registration of a mortgage of slaves necessary both in the slave register and the colonial debt registry; preference regulated by the last. *Brink* v. *Joubert and Discount Bank* v. *Dawes* 310

13. ———— *Jus retentionis*, of mortgagor, against mortgagee, available to enforce performance of reciprocal obligations constituted by mutual agreement; also of force against pledgee of mortgage bond. *Woutersen's Executors q.q. Palmer* v. *Nisbet & Dickson* .. 310

14. ———— Pledge—*pand ter minne*—by notarial bond, of special mortgage bond, what effect, and how affected by anterior agreement between mortgagee and mortgagor. *Ibid.*

15. ———— The holder of a mortgage bond is entitled to preference on the debtor's sequestration, not to full arrears of interest which may be due on the bond, but only to interest for one year in addition to that of the current year. *Cloete* v. *Aling* 318

16. ———— Mode by which a mortgage bond remaining uncancelled in the debt registry may be cancelled, the bond itself being alleged to have been given up by the creditor and receipted; but having been mislaid, so that, after the death of both creditor and debtor, proof could not be given of payment so as to authorize cancellation in the debt registry. *Executors of Swart* v. *All and Sundry* 323

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17. MORTGAGE—A bond of anterior date, but not duly registered until after a bond of posterior date had been registered, postponed to latter. *Smit* v. *Jurgens* 329

18. ———— A. and B. were guardians of a minor, B. benig the administering guardian. A. granted a mortgage bond specially hypothecating certain property to B. as administering guardian, which bond, on B.'s departure from the colony, was delivered as an asset of the minor's estate to C., who had been constituted administering guardian. A. having become insolvent, the question arose whether, for the amount of this bond, there was a preference by virtue of the *legalis hypotheca tutelæ* on the insolvent estate, taking preference of special mortgages prior to the mortgage in question. *Held*, that the estate of A. was not subject to any tutorial hypothec until after excussion of the administering guardians duly constituted, and then for the balance not recoverable from him; that the mortgage bond passed in favour of the administering guardian was not such a debt as *venire potest in judicium tutelæ*, or was secured by the *legalis hypotheca tutelæ*, and therefore to be postponed in order of preference to the special hypothecs of anterior date. *In re Liesching* 329

19. ———— A bond for uncertain amounts, to be advanced in future, and containing a special and general mortgage, is a valid bond in preference, if duly registered. *In re Carter* 335

20. ———— Where a bond for £500 already advanced on security of a special and general mortgage, and for future uncertain advances, was registered as a special bond for £500, without any mention in the registry of the future advances or of the general clause, *held*, that as no particular form of registry is prescribed by law, such registration is sufficient. Where such bond was stamped originally for £500, no objection to the bond can be taken on this ground, the stamp law making no provision for stamps or any other duty on bonds for uncertain amounts. *Ibid.*

21. ———— [*Per* MENZIES, J.] Non-registration of a bond, or a wrong registration, where it is the fault of the registrar of deeds, founds an action of damages against him, but deprives the creditor of preference. *Ibid.*

22. ———— A bond specially hypothecating shares in a ship belonging to the port of Cape Town, duly registered in the custom-house on the day it bears date, and likewise registered in the public debt registry two days after its date, *held* valid, although the proper endorsement on the ship's register of the particulars of the mortgage was not made until after the debtor's insolvency, the vessel being absent from Table Bay at the date of the mortgage, and the endorsement having taken place within thirty days of her return. *In re Carter* 341

23. ———— Order on registrar of deeds so to enregister a notarial bond that by a reference in the registry to the name of the surety and principal debtor, it should appear that he had executed the bond as a surety and joint principal debtor. *In re Pallas* 343

24. ———— Where an uncertificated insolvent, Ordinance No. 64 being then in force, purchased immoveable property, which was mortgaged, and to enable the vendor to give transfer the plaintiff paid off the mortgage, and the insolvent on receiving transfer *simul ac semel* and *pari passu* executed a bond in plaintiff's favour for the amount paid by him, on the trustee to the estate claiming to have the house sold, *held*, in an action for that purpose brought

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against the trustee, that the mortgage in plaintiff's favour was a valid and effectual hypothec over the house. *In re Magodas* .. 344

25. MORTGAGE—A mortgage of land extends to all buildings erected on the land after the date of the bond. *Oberholster* v. *Holtman* .. 346

26. ——— An undertaking to grant a first mortgage bond "on my newly-built house and store" is not fulfilled by granting a mortgage on "a certain house and premises, marked No. 5, together with such other buildings as are now erected on the above landed property"; there being a prior mortgage on the property described simply as "a certain house and garden marked No. 5." A second mortgage of the same property only is thus created. *Ibid.*

27. ——— Moveable property, delivered to a mortgage creditor to be sold in payment of the mortgage debt, and sent to a public sale for such purpose, cannot be seized in execution of a judgment against the debtor in an action in which proceedings were commenced before the delivery. *Haupt* v. *Hancock* 347

28. ——— A cession of securities by a debtor to a creditor who has made advances, accompanied by delivery, with the object that the creditor might recover payment of the securities and apply the amount received in extinction of the debt, vests in the creditor absolutely all right and title in the securities, subject only to an equitable right in favour of the trustees of the debtor's insolvent estate, of compelling the creditor to account with them for the sums received. The securities in question being bonds in the debtor's favour, the Court would, on proof of negligence or dilatoriness on the part of the creditor to recover them, interpose to compel him to take steps for so recovering them, or enable the trustee to recover them. *Sutherland* v. *Elliott Brothers* 349

29. ——— Where a tutor became the purchaser of property then burdened with special mortgages, and on receiving transfer *pari passu* and *simul ac semel*, granted other bonds to the mortgagees in lieu thereof, and afterwards the first mortgagee paid off the other mortgages, and took a fresh mortgage for the whole debt, *held*, that such mortgage was entitled to preference before the minors, who had a tutorial hypothec of prior date. *In re Blomestein* 360

30. ——— A power of attorney authorizing an attorney to appear before the registrar of deeds, to acknowledge a debt due on the purchase-money of land, and to pass a "*schepenkennis*" or mortgage bond in favour of the vendor, is a power authorizing the attorney to insert in the mortgage bond any clause which, by the established usage and custom of the colony, it is the practice to insert in similar bonds, and therefore an authority to insert in a bond, specially hypothecating immoveable property, a clause of general mortgage. *Smith* v. *Randell's Trustees* 385

31. ——— When a bond stipulates three months' notice, it does not become payable on demand on the debtor's death; but notice must be given to his executors. *Smuts* v. *Haupt's Executors* .. 457

32. ——— Where an executor had given notice to creditors to lodge claims in terms of section 30 of Ordinance No. 104, the plaintiff, who had lodged his claim, *held* entitled to claim payment of his bond without giving the usual notice. *Southey* v. *Dormehl's Executor* 476

——— : See BOND.

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MOVEABLES—A bill of sale of moveables, without delivery of the goods gives no *jus in re*, and the holder of such a bill cannot claim the moveables subsequently attached, in seller's possession. *Robertson* v. *Sequestrator* 88

2. ——— Sale of moveables where the goods remained on hire in the possession of the seller, who afterwards became insolvent, not sufficiently proved, so as to divest the insolvent of the *jus dominii*, by the production of notarial agreements of sale and purchase and by hire, and of evidence that on the premises of insolvent the property had been pointed out to a neighbour as having been sold. *Rens* v. *Bam's Trustee* 89

3. ——— Delivery of moveables is necessary to make effectual a special mortgage. *Smuts* v. *Stack and others* 309

4. ——— General hypothec prior in date, preferent to posterior special hypothec on moveables of which delivery had not been made. *Sequestrator* v. *Thompson and another* 311

5. ——— Moveable property, delivered to a mortgage creditor to be sold in payment of the mortgage debt, and sent to a public sale for such purpose, cannot be seized in execution of a judgment against the debtor in an action in which proceedings were commenced before delivery. *Haupt* v. *Hancock* 347

MUNICIPALITY—The municipality of Green Point has no powers or privileges except such as were expressly given to it by the provisions of the ordinance (No. 4, 1839) which created it, among which the right of preference for arrears of road rates was not one. *Municipality of Green Point* v. *Powell's Trustees* 380

NEGOTIORUM GESTOR: *See* AGENT.

NON-COMMUNITY—Provisional sentence granted against a wife married out of community of property, who had bound herself *in solidum* as surety and co-principal debtor for her husband. *Nourse* v. *Steyn, Wife of Griffiths* 85

NON-JOINDER—EXCEPTION OF: *See* PLEADING.

NON-QUALIFICATIE—Objection to title of plaintiffs must be by exception, and not under the general issue. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* 239

——————: *See* PLEADING.

NORTH HOLLAND—LAW OF: *See* INTESTACY.

NOTARY—On the death of testators who have made notarial wills, the original wills must be taken from the notary's protocol, and enregistered with the Master. *In re Herron* 423

NOTICE—Given by a surety, before having paid the debt and become the holder thereof, to the debtor to pay such debt, not sufficient notice to enable the surety to demand from debtor, after having paid the debt and obtained cession. Fresh notice necessary. *Neethling q.q.* v. *Minnaar* 8

2. ——— A. was the debtor on a bond, and B., by a separate deed, became surety, and co-principal debtor. A condition of the bond was notice to the debtor before payment could be demanded. The separate deed was silent as to notice. B. was proceeded against as co-principal debtor, without notice given him. *Held*, that, being a co-principal debtor, without reference to his obligation as surety, he was equally entitled to notice with A., and

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provision refused accordingly. Intimation conveyed to B. of legal proceedings having been taken against A. and the property mortgaged in the bond, was not equivalent to a notice to B. to pay. *Willems* v. *Schendeler* 20

3. NOTICE—Notice to surety unnecessary where the principal debtor has surrendered. *Baard* v. *De Villiers* 55

4. ——— Notice of non-acceptance and dishonour of foreign bill of exchange given to agent is sufficient. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* 239

5. ——— An agent may waive the want of due presentment and protest of a foreign bill of exchange and of due and sufficient notice, so as to bind his principals. *Ibid.*

6. ——— Where plaintiffs gave notice of non-acceptance and dishonour of a foreign bill of exchange to the drawer some months after receipt of the protests (having been prevented from doing so previously by the drawer's absence from the colony), *held*—that this notice was sufficient. *Norton & Co.* v. *Bain* 251

7. ——— Where a promissory note was for the sole accommodation of the indorser, want of notice to indorser of non-payment by maker will not discharge the indorser. *Discount Bank* v. *Crous* 253

8. ——— Notice of dishonour of a promissory note by the maker may be given to the indorser on the very day the note is due, and before such day has wholly expired. *Eaton* v. *Hitzeroth and another* 254

9. ——— Notice of non-payment given on the third day after a promissory note became due is insufficient. *Cruywagen* v. *Oliviera and another* 254

10. ——— Notice of dishonour of a promissory note is not proveable by affidavit in a provisional case. *Anderson* v. *Hutton and another* 259

11. ——— Notice to pay a promissory note required by a condition in the note, cannot be proved by a mere memorandum purporting to have been written by a notary public on the note that notice had been given. Such memorandum not being a notarial act is not proof of itself, but an affidavit proving the notice is required. *Verster* v. *O'Reilly* 270

12. ——— When a bond stipulates three months' notice, it does not become payable on demand on the debtor's death; but notice must be given to his executors. *Smuts* v. *Haupt's Executors* 457

13. ——— Where the executor had given notice to creditors to lodge claims in terms of sect. 30 of Ordinance No. 104, the plaintiff, who had lodged his claim, *held*—entitled to claim payment of his bond without giving the usual legal notice. *Southey* v. *Dormehl's Executor* 476

NOTICE TO QUIT: *See* LEASE.

NOVATION—Where the executor of a fidei-commissary estate, and guardian of the fidei-commissary heirs, handed over the fidei-commissary estate to the fiduciarius, taking a bond from him in security, *held*, that this was a *novatio debiti*, and destroyed the legal hypothec antecedently possessed by the fidei-commissarii on the estate of such fiduciarius. *In re Lutgens* 312

——————— Bars claim for *condictio indebiti*: *See* SURETY.

OATH OF REFERENCE—It is competent for the defendant at any

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time before judgment to refer the whole cause to the oath of the plaintiff, and thus by it to substantiate any matter which was a complete defence to him against the action, whether that matter had or had not been pleaded by him as a defence in his plea. *Villiers* v. *Villiers* 71

ONUS PROBANDI—An acknowledgment of the receipt of the purchase price of goods "to be delivered," is sufficient to found a provisional claim for the repayment of such price, the *onus probandi* being on the defendant. *Dreyer* v. *Roos* 87

2. ———— The onus of proof of the quality of wine sold rests on the purchaser when he has taken part delivery. *Murray* v. *De Villiers* 88

3. ———— It is for the defendant, claiming under a will the property sued for, to show that it was conveyed to him by the will. *Batt* v. *Batt* 408

ORDINANCE No. 31, s. 5. The words "shall be lawful" in sect. 5 of Ordinance No. 31, are discretionary. *Rogerson, N. O.* v. *Meyer and another* 38

———— No. 64, s. 81: *See* COMPOSITION.

———— ———: *See* INSOLVENT.

———— No. 104, ss. 3, 6, 7, 20: *See* WILL.

———— ———, ss. 30, 32, 33: *See* EXECUTOR.

———— No. 4, 1839: *See* MUNICIPALITY.

———— No. 6, 1843, s. 126: *See* INSOLVENT.

PAND TER MINNE: *See* PLEDGE.

PAROL EVIDENCE: *See* EVIDENCE.

PARTNERSHIP—It is not necessary to bring an action in the name of a sleeping partner. *Lolly* v. *Gilbert* 207

2. ———— The benefit of division continues between solvent and insolvent partners of a dissolved firm. *Luck* v. *Chabaud* .. 207

3. ———— An agreement between partners, limiting their respective liability, is of no effect against parties having previously contracted with them. *Hancke q.q.* v. *Breda and another* 207

4. ———— It is a good defence to a provisional claim against two late partners on a bill purporting to be drawn by the partnership that it had been drawn by one partner only after dissolution. *Davis & Son* v. *McDonald & Sutherland* 207

5. ———— What is sufficient evidence, on provision, of dissolution of partnership. *Ibid.*

6. ———— Exception taken to form of action used in a suit between partners. *Iles* v. *Jones and others* 208

7. ———— Construction of clause in a deed of dissolution of partnership. *Still* v. *Norton* 209, 211

8. ———— Service of a summons at the counting-house of a partnership firm, is not service against one of the partners individually. *Terrington* v. *Simpson* 216

9. ———— Personal service on one partner of an alleged partnership, not at the place of business of the firm, *held*, no service as against his alleged partner. *Haupt* v. *Spaarman and another* .. 216

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10. PARTNERSHIP—Partners absent from the colony must be summoned (or required to intervene after summons). Service of their summonses at the place of business of the firm in Cape Town would be good service. *Meintjes & Co.* v. *Simpson Brothers & Co.* .. 216

11. ———— A debt due by a partner is not in law considered as due to the firm, but as due to the other partners, who must recover in an action *pro socio* in their own names. *Jacobson* v. *Norton* 218

12. ———— Where a partner promises to pay to his co-partners jointly, each is entitled, without the concurrence of the other, to sue in his own name for his share. *Ibid.*

13. ———— Where the following receipt was sued on: "Received from Messrs. (Den Heeren) C. Weinert & W. Meyer the value of £83 10s. in medicines, which amount I engage to pay on demand;" *held*, that the terms of the document were not, *per se*, sufficient proof of a partnership. *Weinert & Meyer* v. *Kohl* .. 224

14. ———— In an action to make up the deficiency of assets on the winding-up of the "Stellenbosch Spiritus Company," where there was no evidence that the defendant had signed the articles of co-partnership, or that he had obtained a certificate that he was a shareholder, or that the original certificate of a share he had purchased had been cancelled as required by the articles, *held*, that the defendant had not been proved to have been duly admitted and to have become a shareholder in the co-partnership. *Onkruyd* v. *Haupt* 225

PENALTY—Surety not provisionally liable for a penalty of 5 per cent. for collection stipulated for in the note, where he had simply accepted to pay the amount of the debt. *Steytler* v. *Saunders* .. 15

PERICULUM—Of a vessel sold and actually delivered is transferred to the purchaser, even though the price has not been paid, nor the requisites of the Registry Acts complied with. *Terrington* v. *Simpson* 110

PERSONAL ACTION: *See* ACTION.

PIGNUS: *See* HYPOTHEC.

PLACAAT—Of 21st February, 1564. *Serrurier* v. *Langeveld* 3

2. ———— The placaats of 11th June, 1452, 22nd January, 1515, 1st April, 1580, 28th March, 1677, and 30th April, 1677, being fiscal, have never been law in this colony. *Herbert* v. *Anderson* .. 166

3. ———— The placaat of 9th May, 1744, is not law in this colony. It is therefore unnecessary to register or pay transfer duty on a lease for ninety-nine years. *Maynard* v. *Usher* 170

PLEADING—Under the plea of the general issue it is not competent to lead evidence to show *læsio enormis*. This must be specially pleaded. *Executrix of Durr* v. *Rens* 101

2. ———— Where a document was pleaded in replication to a plea of *plene administravit*, which document might have been well pleaded in replication to a plea of accord and satisfaction, but was not so pleaded—*Held*, that plaintiffs could not found on the document in bar to the plea of accord and satisfaction. *Deneys & Co.* v. *Executors of George* 120

3. ———— Under the general denial of the allegations in the plaintiffs' declaration, a defendant may maintain as a defence against the contract sued on, that such contract was illegal and null

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and void *ab initio*; but may not maintain a defence against the contract sued on when it is not illegal, null, and void *ab initio*, but only voidable in respect of certain concomitant circumstances. *Norden* v. *Trustees of Bonnin* 124

4. PLEADING—A plea of compensation in respect of judgments recovered by defendant against plaintiff may be properly pleaded as a defence against an action founded on a contract of sale. *Trustee of Smith* v. *Norden* 128

5. ———— An *exceptio non qualificatæ* against the right of a cessionary of a lease to sue for the rents falling due, on the ground that the deed of cession did not contain a clause constituting a procuration *in rem suam*, overruled. *Smith* v. *Howse* 163

6. ———— Exception to form of action between partners. *Iles* v. *Jones and others* 208

7. ———— Compensation must be specially pleaded. *Still* v. *Norton* 209

8. ———— No consideration being necessary to support a promise to pay, it is therefore unnecessary in the declaration to set out the inducement of the promise. *Jacobson* v. *Norton* 218

9. ———— *Causa debiti* must be specifically set forth in a declaration. What is such an insufficient specification as to support exception. *Ibid.*

10. ———— Exception of non-qualification sustained, where plaintiffs sued as co-partners on the following document: "Received from Messrs. [Den Heeren] C. Weinert & W. Meyer the value of 83*l.* 10*s.* in medicines, which amount I engage to pay on demand." *Weinert & Meyer* v. *Kohl* 224

11. ———— Declaration alleged a bill of exchange, which it was sought to set aside as an undue preference, to have been drawn by insolvent in favour of defendant. On evidence, it appeared that the bill, which was an accommodation one, was actually drawn by insolvent in favour of one B., and by him indorsed and discounted for the insolvent by the defendant. *Held*—that the description declared on was sufficient to cover the transaction proved. *Breda's Trustees* v. *Volraad* 237

12. ———— Objection to title of plaintiffs must be by exception, and not under the general issue. *Livingston, Syers, & Co.* v. *Dickson, Burnie, & Co.* 239

13. ———— Where the plaintiff, and heir under a mutual will, had obtained a judgment against the executrix for the amount of his inheritance, and now brought an action to have it declared that he had, by virtue of his tacit hypothec, a preference before certain mortgages passed by the executrix, the defendant excepted on the ground that plaintiff should have proceeded to execute the judgment obtained; but *held*, it was optional with him to do that or bring this action. *Gnade* v. *Executors of Piton and others* 428

14. ———— Where, on appeal from the Circuit Court, the appellant sought to object that some of the heirs interested in the will in issue had not been made parties to the cause—*Held*, that this should have been excepted in the Court below *initio litis*. *Bekker* v. *Meyring* 436

15. ———— It is not essential that all parties interested in a will should be made parties to a suit brought by one or more of them;

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but the decision of the Court being, as regards the parties not intervening, *re inter alios acta*, cannot bind them *re judicatâ*. *Bekker* v. *Meyring* 436

PLEDGE—PAND TER MINNE—By notarial bond of special mortgage bond, what effect, and how affected by anterior agreement between mortgagee and mortgagor. *Woutersen's Executors q.q. Palmer* v. *Nisbet & Dickson* 310

2. ——— Pledge of moveables by attachment is equivalent to tradition, and is preferent to tacit or legal hypothec of prior date without tradition. *Cloete* v. *Colonial Government* 312

3. ——— Pledge of title deeds of immoveable property—*quære*, how far effectual against any third party having obtained a *jus in re* or *jus in rem* to such property. *Phillips & King* v. *Trustees of Norton* 369

———: *See* HYPOTHEC.

PLENE ADMINISTRAVIT—PLEA OF: *See* PLEADING.

POLITICAL ORDINANCES OF THE STATES GENERAL—OF 1ST APRIL, 1580, AND 13TH MAY, 1594: *See* INTESTACY.

POSSESSION—Of a bond not sufficient evidence of payment to enable one surety to claim provision against his co-surety. *Neethling* v. *Hamman* 20

POWER OF ATTORNEY—A special power of attorney to sell goods and receive money gives no power to go beyond, nor to defend suits; and therefore an action brought against such attorney dismissed accordingly. *Cooke* v. *Hogue and another* 179

2. ——— Mandatores, creditors in insolvency:—*Held*, liable to make good the expenses of the mandate each *pro ratâ* his own share only, and not liable to make good the shares of insolvent mandatores. *Chiappini* v. *George* 179

3. ——— Mandate ceases by the death of the mandant (principal). Proceedings in the name of a dead person, after death, null, and set aside. Costs of an attorney for proceeding in the name of a dead party not allowed where the death was known to him. *Heartley* v. *Poupart* 180

4. ——— A bond executed in favour of a mandatory (agent) "or his administrators," may be sued upon after his death by his administrator. *Rowle's Executrix* v. *Mostert* 180

5. ——— A general power of attorney *cum specialibus potestatibus*, without special authority to sell immoveable property, does not authorize the sale and transfer of immoveable property. Circumstances in which a transfer by virtue of such a power, together with a holograph letter of the principal, was allowed by the Court, without prejudice to the principal's rights. *Moodie* v. *Registrar of Deeds* 190

6. ——— Authority, by letter, to purchase a waggon at a sale, in which the principal wrote, "I expect the sale is at six months' credit," is exceeded by a purchase payable in cash or on delivery. *Harris* v. *Ruthven* 191

7. ——— A power of attorney authorizing an attorney to appear before the registrar of deeds, to acknowledge a debt due on the purchase-money of land, and to pass a "*schepenkennis*," or mortgage bond in favour of the vendor, is a power authorizing the attorney to insert in the mortgage bond any

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clause which, by the established usage and custom of the colony, it is the practice to insert in similar bonds; and therefore an authority to insert in a bond specially hypothecating immoveable property, a clause of general mortgage. *Smith* v. *Randall's Trustees* 385

PREFERENCE—A purchaser of immoveable property, who has not obtained transfer *coram lege loci*, entitled, on the insolvency of the vendor, to be ranked, for the restitution of the purchase price paid by him, only concurrently with the personal creditors of the insolvent. *Harris* v. *Trustee of Buissinne* 105

———————: *See* HYPOTHEC; MORTGAGE.

PRESENTMENT—Of a promissory note for payment, before summons is issued, is necessary to save costs. *Brink* v. *Gough* 256

2. ——————— Presentment and non-payment of a promissory note are not proveable by affidavit in a provisional case. *Meiring* v. *De Villiers* 256

3. ——————— Information received that the maker of a promissory note had given up his residence and gone with his waggons into the interior, does not relieve the holder from presentation at the maker's last known place of abode. *Twentyman & Warner* v. *Norden* 271

4. ——————— A waiver by the indorser of a promissory note a week before due date, of presentment to the maker, does not bind such indorser. *Ibid.*

5. ——————— The holder of a note or bill must present it for payment on the day it becomes due. *Ibid.*

6. ——————— Presentment on the third day after that on which the note became due is not due negotiation in a question with the indorser. *Randall's Trustee* v. *Haupt* 281

7. ——————— Presentment of an accepted acknowledgment payable on presentation, is necessary before summons is issued, otherwise the maker paying is relieved from costs. *Johnstone* v. *Kotze* 284

8. ——————— Presentment to maker of a note after summons is good, but unnecessary unless defendant on receipt of the summons alleged that on that day he had funds. *Villiers* v. *De Kock* .. 285

9. ——————— There must be actual presentment to the maker of a note not made payable at a particular place. *Steytler* v. *De Villiers* 286

PRINCIPAL AND AGENT: *See* AGENT.

PROCLAMATION OF 6TH SEPTEMBER, 1805: *See* SURETY.

——————— OF 30TH JANUARY, 1818. *Brink* v. *Joubert* .. 310

——————— OF 12TH JULY, 1822: *See* WILL.

PROCURATOR—*In rem suam* entitled to sue provisionally on a lease. *Neethling* v. *Taylor* 162

PROMISSORY NOTE—Provisional sentence refused against a defendant, who, not being a party to a promissory note, had signed his name at the back of the note. Such signature creates no liquid liability; the liability (if any) must be established in the principal case. *Norton* v. *Satchwell* 55

2. ——————— Provisional sentence granted on a promissory note, payment of which was first demanded four years after it was due. *Reitz* v. *De Kock* 253

1. PROMISSORY NOTE.—Where a promissory note was passed to be for the sole accommodation of the indorsee:—*Held*, that want of notice to indorser of non-payment by maker will not discharge indorser. *Lourens Retief* v. *Cronje* 253

2. ——— ——— Notice of dishonour of promissory note by maker may be given to indorser on the very day the note is due, and before such day has wholly expired. *Eaton* v. *Bilworth and another* 254

3. ——— ——— Provisional sentence granted on a promissory note against an executor, the maker, although the estate had been subsequently in the making of the note surrendered as insolvent. *Kan and others* v. *Kanough* 254

4. ——— ——— Provisional sentence granted on a promissory note where the consideration was alleged to be usurious. *Rens* v. *Hurst* 254

5. ——— ——— Protest for non-payment of inland note necessary to render indorser liable. *Cruywagen* v. *Olivier and another* 254

6. ——— ——— Notice of non-payment given on the third day after the note became due insufficient. *Ibid.*

7. ——— ——— There are no days of grace in this colony. *Cruywagen* v. *Olivier*; *Randell's Trustee* v. *Haupt* .. 254, 281

8. ——— The copy of a promissory note on which an indorsee claims provisional sentence must contain a copy of the indorsement through which title is acquired. *Webster* v. *Van Hellings* 255

11. ——— ——— Provisional sentence granted on a promissory note, containing a penal stipulation, for the amount of the note, but not of the penalty. *Steytler* v. *Smuts* 256

12. ——— ——— Presentment and non-payment of a promissory note are not provable by affidavit in a provisional case. *Meiring* v. *De Villiers* 256

12½. ——— ——— Where a promissory note is not made payable at any specified place, and summons is issued against the drawer, without previous presentment, *held*, that if defendant, on being so summoned, at once tenders the sum to plaintiff or his attorney, he will not be liable for costs of summons. But such a tender to the sheriff's officer on service is bad unless he has been entrusted with the promissory note by the plaintiff to demand payment. *Brink* v. *Gough* 256

14. ——— ——— Provisional sentence granted against the maker and the indorser in blank of a promissory note notwithstanding parol evidence tendered on their part that the holder had become possessed of the note fraudulently and for a usurious consideration, such evidence not being received. *Muller* v. *Redelinghuys and another* 257

15. ——— ——— Provisional sentence refused on a promissory note, on the ground of novation of the debt, where the payee had subsequently entered into a written engagement to wait for payment until a certain contingency. *Cannon* v. *Ford* 257

16. ——— ——— Signature to a promissory note, when denied, may be proved instanter on the provisional claim. *Dieterman* v. *Carlewitz*; *Norden's Trustee* v. *Butler* 257, 289

17. ——— ——— Provisional sentence granted against the

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maker of a promissory note, who alleged an error in the date of the note, but did not sufficiently satisfy the Court as to such error. *Waters & Heron* v. *De Roubaix* 258

18. PROMISSORY NOTE—Double costs given as the penalty of a *mala fide* denial of signature and ability to write. *Deneys* v. *Daniel* .. 258

19. ——— Where presentment is not made until four months after due date of a promissory note specifying no place of payment, if the defendant tender payment of the note on presentment to be made to him thereof, such tender will save him from the costs of summons, but not when he only makes such tender in Court on day of hearing. Service of summons is sufficient demand for payment. *Redelinghuys* v. *Theunissen* 258

20. ——— The debtor on a promissory note is not liable to the costs of a notice to pay served on him by the holder of the note. *Wicht* v. *Faure* 259

21. ——— Provisional sentence granted on a promissory note not expressing any *causa debiti*, and where defendant did not take it upon himself to deny value given. *Low* v. *Oberholzer* .. 259

22. ——— A promissory note referring in its terms to an antecedent agreement, *ex facie* unconditional, cannot, in a provisional case, be invalidated by parol evidence that such agreement was conditional, and its condition unfulfilled. *Keyter* v. *Viljoen* 259

23. ——— Notice of dishonour of a promissory note is not provable by affidavit in a provisional case. *Anderson* v. *Hutton and another* 259

24. ——— Where the maker of a promissory note, no place of payment being specified, and no presentment having been made, by first post after receipt of summons caused a tender to be made, *held*, sufficient to free from costs. *Orlandini* v. *Pope* 260

25. ——— It is (by the provisions of Ordinance 64) a defence against a provisional claim on a promissory note, that the payee who had indorsed the note was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. (But by Ordinance No. 6, 1843, s. 126, such indorsation is good if made after the confirmation of the account and plan of distribution). *Smith* v. *Campbell* 260

26. ——— Where the plaintiffs have given no consideration to the payee, or have not done so until after the note was due, the maker of the promissory note is entitled, in a provisional claim, to the same defences against them as he had against the payee. *Hovil & Mathew* v. *Wood* 261

27. ——— Submission to arbitration between the maker and payee of a promissory note, bars the payee from recovering provisional sentence on the note, pending the submission. *Ibid.*

28. ——— Provisional sentence refused against a defendant, who had written his signature below the word "accepted," across a promissory note, although the maker of the note had first been excussed. *Brink* v. *Minnaar* 261

29. ——— O., an uncertificated insolvent, carried on business after his insolvency with the knowledge, although not with the express permission, of his trustees, and sold goods to C., who knew of his insolvency. C. paid O. with two notes in his favour or order. O. endorsed the notes to S., who also knew of

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the insolvency. Subsequently S. took from C. directly, without O.'s name thereupon, two other notes in lieu of the first-mentioned notes, and now sued C. on one of them. C. pleaded no consideration, but *held*, that the delivery up of the first two notes was sufficient consideration to found this action. Had S. sued on the notes originally given, it being proved that the insolvent had received valuable consideration for them, S. would have successfully maintained the action, even although the trustees had intervened and claimed on the notes. *Stretch* v. *Campbell* 261

30. PROMISSORY NOTE—It is sufficient consideration to support a provisional claim on two promissory notes for £70 each, given at the same time for coals sold, although the coals on one note alone had been delivered, and those on the other note rejected as bad, the plaintiffs denying the defendant's right so to reject, and defendant not being able to prove his right by the production of liquid proof instanter. *Collison & Co.* v. *Eksteen* 266

31. ——— The word "accepted" written across the face of a promissory note, with a signature below it, creates no liquid liability. *De Kock* v. *Russouw and another* 266

32. ——— It is a good defence against a claim by the payee of a promissory note that other securities had been given in payment by the maker, and accepted by the payee. *Sutherland* v. *Elliott Brothers* 267

33. ——— An indorsee of a promissory note without value is liable to the same defences as his indorser. *Taylor* v. *Elliott Brothers* 267

34. ——— *Bonâ fide* indorsees of a note held entitled to provisional sentence, notwithstanding the defendant had a good defence against the payee. *C. G. H. Bank* v. *Elliott Brothers and another* 267

35. ——— Provisional sentence given against the maker of a promissory note, notwithstanding an allegation of payment to the payee after the note became due; the note having been presented by the holder to the maker when long overdue. *Levicks & Sherman* v. *Eksteen* 267

36. ——— Provisional sentence refused to a *bonâ fide* holder, where, before the word "sixty," in the body of the note, had been inserted the words "one hundred and," by the payee, as it was alleged. [But in the principal case, the Court, finding from the evidence that there was no cause to doubt the genuineness of the note as a note for 160*l.* gave judgment for plaintiff for that amount with costs.] *Rawstone* v. *Wolhuter* 267

37. ——— Payment to the payee of a promissory note is no answer in a provisional claim by the *bonâ fide* holder. *Truter* v. *Heyns* 269

38. ——— Where a promissory note is made payable in a certain time after notice, such notice cannot be proved by a mere memorandum that it had been given, purporting to be written by a notary public on the note; but must be supported by affidavit to that effect. *Verster* v. *O'Reilly* 270

39. ——— It is a material variance between a promissory note and the copy served to describe the note as for "the sum of and ten pounds," instead of "the sum of one hundred and ten pounds." *Atkinson v. Norden* 270

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40. PROMISSORY NOTE—Where a note not originally made to order had been ceded by the payee to A. or order, *held*—that a simple indorsation by A. was sufficient to entitle his indorsee to sue, without requiring a formal cession. *Thomson, Watson, & Co.* v. *Malan* 270

41. ——— The fact of a note being dated in Cape Town has not, in law, the effect of making it payable there. *Twenty-man & Warner* v. *Norden* 271

42. ——— Information received that the maker of a promissory note, resident at Caledon, has "given up his residence there, and has gone with his waggons into the interior, and expects to be away three or four months," does not relieve the holder from the necessity of presentation. *Ibid.*

43. ——— Alteration of the date of a note from the 22nd to 30th, with the knowledge of the maker, does not discharge him from liability, and therefore does not make presentment to him unnecessary, nor even, as regards the maker's liability, where such alteration has been made without his knowledge. A waiver on the first of the above-mentioned dates by the indorser of presentment to the maker does not bind such indorser, where, in fact, the 30th was the correct date of the note. *Ibid.*

44. ——— The holder of a note or bill must present it for payment on the day it becomes due. *Ibid.*

45. ——— Joint acceptors, drawers, and indorsers are liable, *singulii in solidum*, unless the contrary is expressed in the bill. (Overruling *Rens* v. *Cantz and another*, p. 231.) *Kidson* v. *Campbell and another* 279

46. ——— Provisional sentence granted on a promissory note where the signature had been previously denied, and the plaintiff had then failed to prove the same, but refused for the costs to which the plaintiff was put by such denial. *Birkwood* v. *Van Rooyen* 280

47. ——— Circumstances entitling the maker of a promissory note to claim that the question whether the holder of the note was liable to the same defences as the original payee should be tried in the principal case, viz., agreement between maker and payee to renew, and action by plaintiff, the holder, on the basis of this agreement. *Dobie* v. *Lawton* 280

48. ——— It is a good defence against a provisional claim on a promissory note, that the plaintiff, with other creditors, had entered into an agreement in writing to give time to the defendant on certain conditions. *Searight & Co.* v. *Lawton*; *Dickson, Burnie, & Co.* v. *Lawton* 281

49. ——— Circumstances as to agreement to give time amounting to a defence against a provisional claim on a promissory note. *Borradaile & Co. v. Lawton* 281

50. ——— Waiver by indorser of due negotiation of a promissory note, cannot be proved by affidavit in a provisional case. *Randall's Trustee* v. *Haupt* 281

51. ——— Provisional sentence refused against the indorser, where the presentment of the note was on the third day after it became due. *Ibid.*

52. ——— Where a note was made payable at a par-

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ticular place "in the month of October," and notarial protest was made on the 22nd November, such protest *held* unnecessary, and costs thereof disallowed. In such a case the 31st October must be deemed the day of payment. *Beukes* v. *Van Wyk* 282

53. PROMISSORY NOTE—Where a note is made payable at a particular place, on a particular day, and is presented on behalf of the creditor, at that place and not paid, he is entitled to the fair costs of such presentment, although the notary have to travel a far distance to make it. But not if the note be duly paid. *Ibid.*

54. ——————— A promissory note payable "at sight, or as soon as a bill of exchange (referred to in it) shall be discounted," is an illiquid document. *Norden* v. *Cauvin* 284

55. ——————— Where an accepted acknowledgment is made payable on presentation, the sheriff's service of a summons for the amount is not such presentment, and where a defendant had under these circumstances tendered the amount of the note without costs, the Court upheld his right so to do. *Johnstone* v. *Kotze* 284

56. ——————— Presentment to maker of note after summons is good, but unnecessary unless defendant on receipt of the summons alleged that on that day he had funds. *Villiers* v. *De Kock* 285

57. ——————— Where the holder of a note not made payable at a particular place summoned the defendant without presentment, the Court awarded the costs to defendant; but, holding that defendant, immediately on service, should have tendered the amount on condition of the note being presented, which he had not done until the day of hearing, gave plaintiff the costs of the day. *Steytler* v. *De Villiers* 286

58. ——————— There must be an actual presentment of such note, and not a mere letter of demand before summons. *Ibid.*

59. ——————— Interest on an English promissory note not specifying place of payment, is calculated according to the rate of interest due in England, and is reckoned until the date of payment in the colony, and not until the date of receiving the capital in England. *Phillips & King q.q. Porcia* v. *Farmer* 287

60. ——————— What is not due protest for non-payment as against indorser. *Haw* v. *Codrington and another* 287

61. ——————— Provisional sentence granted on a promissory note, notwithstanding an error of due date appearing on the face of the document. *Kilian & Co.* v. *Tredoux* 288

62. ——————— A summons for payment of a promissory note cannot legally be taken out on the day the note becomes due. *Thalwitzer* v. *Sparmann* 289

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PROTEST—NOTARIAL—Proof of presentment of a bill of exchange by the production of protest for non-payment, in which protest presentment is alleged, cannot, in a provisional case, be negatived by parol evidence. *Hovil & Mathew* v. *Poulteney* 229

2. ——————— Copy of protest for non-payment of a bill of exchange need not be served on the defendant. *Rens* v. *Van der Poel and another* 233

3. ——————— The production of protest of presentment for acceptance or sight of a bill of exchange payable after sight is

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necessary to found provisionally. The protest for non-payment only is insufficient. *Phillips & King* v. *Ridwood* 239

4. PROTEST—NOTARIAL—Where a note was made payable at a particular place "in the month of October," and notarial protest was made on the 22nd November, such protest held unnecessary, and costs thereof disallowed. *Beukes* v. *Van Wyk* 282

5. ——— ——— Where a note is made payable at a particular place, on a particular day, and is presented on behalf of the creditor at that place and not paid, he is entitled to the fair costs of a notarial protest for non-payment, although the notary have to travel a far distance to make it. But not if the note be duly paid. *Ibid.*

6. ——— ——— What is not due protest for non-payment as against indorser. *Haw* v. *Codrington and another* 287

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PROVISIONAL SENTENCE—GRANTED—Against sureties who had signed conditions of sale. *Orphan Chamber* v. *Sertyn and others* .. 7

2. ——— ——— Against bond surety and co-principal debtor, who had renounced the benefit of excussion and division, it being no defence that the creditor had made no claim on the estate of the debtor who subsequently became insolvent, and was therefore unable to give cession of action; the debtor's estate being admittedly insufficient to have met any preferent claim that might have been made upon it. *Vermaak* v. *Cloete* 35

3. ——— ——— Against a wife, married out of community, who had bound herself as surety and co-principal debtor for her husband. *Nourse* v. *Steyn, Wife of Griffiths* 85

4. ——— ——— Upon a bond in which the obligor undertook to pay the purchase-money of land on transfer being given, the summons tendering such transfer forthwith. *Vouchee* v. *Van Ellewee* 99

5. ——— ——— On a lease. The production of the lease is sufficient to entitle the lessor to claim provisional sentence for rent. *Neethling* v. *Taylor* 192

6. ——— ——— On an underhand contract of lease. The lessor need not prove the lessee's possession under the contract. *Truter* v. *Everest* 169

7. ——— ——— On a lease, notwithstanding a defence of unliquidated damages. *Vowe v. Pedder* 169

8. ——— ——— On a written acknowledgment of the receipt of the purchase price of goods "to be delivered" for the repayment of such price, the *onus probandi* the delivery being on the defendant. *Dreyer* v. *Roos* 87

9. ——— ——— Against the drawer of a bill of exchange on production of a notarial protest for non-payment, in which protest presentment is alleged. This proof of presentment cannot on provision be negatived by parol evidence. *Hovil & Mathew* v. *Poulteney* 229

10. ——— ——— Against the indorser of a bill of exchange, without alleging in the summons that the bill had been presented to the acceptor, and that payment had been refused. *Rens* v. *Van der Poel and another* 233

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11. PROVISIONAL SENTENCE—GRANTED—Against the acceptor and the drawer and endorser of a bill of exchange, although no protest was produced of any presentment or demand for payment having been made to the acceptor: *Muller v. Van Oudtshoorn and another* 236

12. ——— ——— Against the acceptors of a foreign bill of exchange, without proof of presentment at specified place of payment in England. *Williams & Co.* v. *Farmer*.. .. 238

13. ——— ——— On a promissory note, payment of which was first demanded four years after it was due. *Reitz* v. *De Kock* 253

14. ——— ——— Against an executor, maker of a promissory note, although the estate had, subsequently to the making of the note, been surrendered as insolvent. *Ross and others* v. *Muntingh* 254

15. ——— ——— Where the consideration of the promissory note was alleged to be usurious. *Rens* v. *Horak* .. 254

16. ——— ——— On a promissory note containing a penal stipulation, for the amount of the note, but not of the penalty. *Steytler* v. *Smuts* 256

17. ——— ——— Against the maker and the indorser in blank of a promissory note, notwithstanding parol evidence tendered on their part that the holder had become possessed of the note fraudulently, and for a usurious consideration; such evidence not being received. *Muller* v. *Redelinghuys and another* 257

18. ——— ——— Against the maker of a promissory note, who alleged an error in the date of the note, but did not sufficiently satisfy the Court as to such error. *Waters & Herron* v. *Roubaix* 258

19. ——— ——— On a promissory note not expressing any *causa debiti*, where defendant did not take it upon himself to deny value given. *Low* v. *Oberholzer* 259

20. ——— ——— On a promissory note referring in its terms to an antecedent agreement *ex facie* unconditional, parol evidence being held inadmissible to invalidate the note by showing that such agreement was conditional, and its condition unfulfilled. *Keyter* v. *Viljoen* 259

21. ——— ——— On two promissory notes for £70 each, given at the same time for coals sold, although the coals on one note alone had been delivered, and those on the other note rejected as bad, the plaintiffs denying the defendant's right so to reject, and defendant not being able to prove his right by the production of liquid proof instanter. *Collison & Co.* v. *Eksteen* 266

22. ——— ——— Against the maker of a promissory note, notwithstanding an allegation of payment to the payee after the note became due, the note having been presented by the holder to the maker when long overdue. *Levicks & Sherman* v. *Eksteen* 267

23. ——— ——— On a promissory note, notwithstanding an error of due date appearing on the face of the document. *Kilian & Co.* v. *Tredoux*.. 288

24. ——— ——— REFUSED—Against a surety on a judg-

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ment obtained against an office-holder on his own admission in an action to which the surety was no party. *Sutherland* v. *Snell* 7

25. PROVISIONAL SENTENCE—REFUSED—On a deed of indemnity to a surety, the payment of the debt by the surety being incapable of proof without evidence extrinsic of the deed. *Cloete* v. *Eksteen* 20

26. ——— ——— Against a co-surety on a mortgage bond, on a claim founded on the possession of the bond, with an acknowledgment endorsed thereon that the creditor had received payment of the whole sum from the plaintiff, this not being sufficient evidence of payment to entitle him to provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 20

27. ——— ——— Against a surety, on the ground that, being a co-principal debtor, he was entitled to the same notice that by the condition of the bond the principal debtor was entitled to. *Willems* v. *Schendeler* 20

28. ——— ——— Against a defendant, who, not being a party to a promissory note, signed his name at the back of the note. Such signature creates no liquid liability either as indorser or surety. Such liability must be established on the principal case. *Norton* v. *Satchwell* 55

29. ——— ——— On an acknowledgment of the purchase of goods, which *ex facie* of the document were to be delivered only under certain circumstances, the proof of which must be extrinsic, coupled with a promise of payment, as not being a liquid document. *Fischer* v. *Daneel* 89

30. ——— ——— For the first instalment (under conditions of sale) of landed property purchased at public auction, the defendant, who held a mortgage bond over the property having offered to allow the amount of such bond in compensation of the sum claimed. *Eaton, N. O.* v. *Johnstone* 89

31. ——— ——— For the second instalment of the purchase price of a farm (sold payable in three instalments, transfer to be given on the payment of the last), the seller refusing immediate transfer notwithstanding a tender of the other instalment. *Norden* v. *Cole* 126

32. ——— ——— On a lease entered into by a minor with the assistance of his mother, not his legal guardian (Menzies, J., *diss.*) *Gantz* v. *Wagenaar* 162

33. ——— ——— For the balance of an account current rendered by a commission agent of his commission sales, such account shewing a balance in favour of his principal. *Smith* v. *Southey* 192

34. ——— ——— For want of presentment for payment to the acceptor, in a provisional claim against the drawer of a bill of exchange, such presentment being necessary although the acceptor became insolvent before the bill fell due. *Thomson & Co.* v. *Archer* 228

35. ——— ——— Against the defendant, who, after protest for non-payment, had guaranteed the payment of a bill of exchange to the drawer, there being no proof offered of any demand on and refusal by the acceptor after such guarantee by the defendant. *McDonald* v. *Sutherland* 230

36. ——— ——— Against two late partners

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on a bill of exchange purporting to be drawn by the partnership, but drawn by one partner only after dissolution of the partnership. *Davis & Son* v. *McDonald & Sutherland* 230

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38. ——— ——— On a bill of exchange, on the ground that the holder, who was also the payee, had after the drawing of the bill been sequestrated as insolvent, and that although since rehabilitated, no assignment to him had been made by the creditors under the sequestration. *Barry* v. *Bailey* .. 231

39. ——— ——— Where the summons did not aver the indorsement by the payee of a bill of exchange. *Moore* v. *Alexander* 231

40. ——— ——— On a bill of exchange, where the indorsement was in so qualified a form, as not to entitle plaintiffs to sue. *Thompson & Watson* v. *Allen* 232

41. ——— ——— Against the acceptor of a bill of exchange, payable at a particular place, because presentment at such place was not duly alleged in the summons and proved. *Simpson Brothers* v. *Allingham* 233

42. ——— ——— On a bill or order payable on a contingency respecting which extrinsic proof would be required. *Geert* v. *Van As* 235

43. ——— ——— Against the drawer of a bill of exchange, who is not provisionally liable to the acceptor who has paid the bill, since such payment may have been made out of the drawer's own funds. *Norden* v. *Stephenson* 235

44. ——— ——— Against a joint acceptor of a bill of exchange, at the suit of another joint acceptor who had the bill in his possession and on it an acknowledgment from the holder that the amount had been received from him. Such possession and acknowledgment do not afford such presumption of payment by the plaintiff joint acceptor as to entitle him to sue the other two provisionally for their shares. *Gie* v. *De Villiers* .. 236

45. ——— ——— Against one of the drawees of a bill of exchange, of whose acceptance, alleged to be by mark, the only evidence appearing *ex facie* of the document, was three crosses. The Court refused proof that one of these was the acceptor's cross or mark. *Carstens* v. *Hendriks* 236

46. ——— ——— Where the acceptance of a bill of exchange was payable on a contingency requiring extrinsic proof, such acceptance being illiquid. *Norton* v. *Speck and another* 239

47. ——— ——— Against the drawer of a bill of exchange, where the summons did not allege presentment to the acceptor. *Ibid.*

48. ——— ——— Against the drawer of a bill of exchange payable after sight, in respect that there was no protest alleging presentment for acceptance or sight to the drawee, though a protest for non-payment was produced. *Phillips & King* v. *Ridwood* 239

49. ——— ——— In respect of the non-de-

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scription in the summons of the notes on which the claim was founded. *Hovil & Mathew* v. *Saunders and another* 256

50. PROVISIONAL SENTENCE—REFUSED—On a promissory note, on the ground of novation of the debt, where the payee had subsequently entered into a written engagement to wait for payment until a certain contingency. *Cannon* v. *Ford* 257

51. ——————————— ——— On a promissory note, on the ground that the payee, who had indorsed the note, was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. [But by Ord. No. 6, 1843, s. 126, such indorsation is good if made after the confirmation of the account and plan of distribution.] *Smith* v. *Campbell* 260

52. ——————————— ——— On a promissory note sued on by the indorsees, on account of circumstances entitling the maker of the note to the same defences against the indorsees as against the payee, viz., that the indorsees had given no consideration to the payee, or had not done so until after due date. *Hovil & Mathew* v. *Wood* 261

53. ——————————— ——— On a promissory note on the ground of submission to arbitration. *Ibid.*

54. ——————————— ——— Against the defendant, who had written his signature below the word "accepted," across a promissory note, although the maker of the note had first been excussed. *Brink* v. *Minnaar*; *De Kock* v. *Russouw and another* 261, 266

55. ——————————— ——— On a promissory note sued on by the payee, on the ground that other securities had been given in payment by the maker, and accepted by the payee. *Sutherland* v. *Elliott Brothers* 267

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57. ——————————— ——— On a promissory note on the ground that the plaintiffs, with other creditors, had entered into an agreement in writing to give time to the defendant, on certain conditions. *Searight & Co.* v. *Lawton*; *Dickson, Burnie, & Co.* v. *Lawton*; *Borradaile & Co.* v. *Lawton* 281

58. ——————————— ——— Where, in a question with the indorser the presentment of a promissory note was on the third day after that on which the note became due, this not being, as against the indorser, a due negotiation of the note. *Randall's Trustees* v. *Haupt* 281

59. ——————————— ——— On a promissory note payable "at sight, or as soon as a bill of exchange" (referred to in the note) "can be discounted," such a note not being a legal document. *Norden* v. *Cauvin* 284

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5. ———— The purchaser of a vessel has the *periculum* transferred to him by the sale and actual delivery, even though he has not yet paid the price, nor complied with all the requisites of the Registry Acts. *Terrington* v. *Simpson* 110

6. ———— The purchaser of immovable property, who has not obtained transfer before the surrender of the estate of the seller, cannot compel the seller's creditors to give him transfer of the property purchased, although he may previously have paid the whole of the stipulated price to the seller, or may offer to do so to the creditors. *Trustee of Smith* v. *Norden* 128

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2. ———— Declaration of sureties to a later duly registered bond, that they are satisfied with the mortgage contained in a former unregistered bond, will not bar objection of nullity in respect of want of due registration of such former bond. *Meyer* v. *Deneys* 6

3. ———— The non-registration of a bond releases the surety although co-principal debtor, by reason of the creditor's having lost the special mortgage in the bond by neglect of registry. *Kotzé* v. *Meyer* 6

4. ———— Non-registration of a general mortgage by the creditor releases the surety. *Meyer* v. *Low*; *Watermeyer q.q.* v. *Theron and another* 8, 14

5. ———— To give preference against a surety, there must be separate and distinct registration in his name. *In re Kotzé* .. 67

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6. REGISTRATION—The registration of a mortgage of slaves is necessary both in the slave register and the colonial debt registry; preference regulated by the date of the registration in the debt registry. *Brink* v. *Joubert and Discount Bank* v. *Dawes* 310

7. ———— A *fidei-commissum* need not be registered to entitle it to a hypothec. *In re Lutgens* 312

8. ———— A bond of anterior date, but not duly registered until after a bond of posterior date had been registered, postponed to latter. *Smit* v. *Jurgens* 329

9. ———— Where a bond for £500 already advanced and for future uncertain advances, was registered as a bond for £500 without any mention in the registry of the future advances, *held*, that as no particular form of registry is prescribed by law, such registration is sufficient. *In re Carter* 335

10. ———— [*Per* Menzies, J.]: Non-registration, or a wrong registration, where it is the fault of the registrar of deeds, founds an action of damages against him, but deprives the creditor of preference on his bond. *Ibid.*

11. ———— Registrar of deeds ordered so to enregister a notarial bond that by a reference in the registry to the name of the surety and principal debtor, it should appear that he had executed the bond as a surety and joint principal debtor. *In re Pallas* 343

———— Registration of will: *See* WILL.

REGISTRY ACTS—Where a vessel has been sold and actually delivered, no right of property therein (*jus in re*) passed or could pass, or be transferred by the seller to the buyer until the bill of sale had been presented to the collector of customs, and the other requisites of the Registry Acts complied with. But this effect of the Registry Acts does not in the slightest degree interfere with, affect, or deprive of effect, the rule of the civil law, *periculum rei venditæ nondum traditæ est emptoris*, because that rule contemplates the case, namely, when in respect of want of tradition no property in the thing sold had passed to the buyer. *Terrington* v. *Simpson* 110

REHABILITATION of surety, bar to fresh claim: *See* SURETY.

RE-LOCATION: *See* LEASE.

RENT: *See* LEASE.

REPAIRS: *See* LEASE.

REPUDIATION—By surviving widow, married in community, of her interest in the joint estate on the death of her husband, necessary, even if there be no joint estate to repudiate, to free her from husband's debts contracted during the marriage. *Brink* v. *Louw, Widow of Niekerk* 71

RES JUDICATA—A decree of the Court of Landdrost and Heemraden regarding the right to water of co-proprietors is *res judicata* of a competent Court as regards these proprietors and their successors. Such a decree, even if founded on an error in fact, would be *res judicata* until set aside in a regular action of reduction. *Du Toit* v. *Malherbe* 299

RIGHT OF WAY: *See* WAY.

SALE—Breach of contract of sale is no defence against payment of price for what has been delivered to the buyer; only a ground for action of damages. *Stiglingh* v. *De Villiers* 89

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2. SALE—A sale through a broker, of ironmongery on an invoice, set aside, it appearing that the articles had been in store for a long time, and that the invoice was in this respect a fictitious one. *Farmer* v. *Executors of Durham* 97

3. —— Sale through a broker, to sample, as per invoice, of 184 chests of Canton Bohea at 9*d.* per lb., and 264 chests of Fokeen Bohea at 1*s.* per lb., and in the invoices no mention of Fokeen Bohea was made:—*Held*, a sale on faith of the sample and warranty combined; and the warranty being that the 264 chests were Fokeen Bohea, the defendants were entitled, on discovering it was not, to refuse to pay for it as such. *Waters & Herron* v. *Phillips & King* 99

4. —— An agreement of sale of immoveable property, followed by delivery of possession, gives the purchaser nothing more than a *jus ad rem* and a personal claim against the vendor to convey the *jus in re* or *dominium* to him by transfer *coram lege loci*. *Harris* v. *Trustee of Buissinne* 105

5. —— Where B. & Co. ordered from India, through H. & Co., a quantity of "Chinsurah cigars, green quality, same as sample box," bearing a particular label, and there subsequently proved to be no such maker as named in the label in India, and the local agents of H. & Co. bought, instead, boxes of cigars by other celebrated makers, *held*, on a construction of the terms of the order, and it being shewn that the quality of the cigars bought was equal to that of the labelled sample, that the defendants were bound to take delivery accordingly. *Hamilton, Ross, & Co.* v. *Bam & Co.* 144

6. —— Contract of sale, under certain circumstances, considered as completed by purchaser's letter coupled with the seller's unqualified and unconditional acceptance of the offer therein contained. *Fry* v. *Reynolds* 153

SALE AND PURCHASE—G. sold and delivered on credit certain wine to W., whose estate was afterwards sequestrated. G. within six weeks reclaimed the wine or its proceeds. *Held*—that the sale having been on credit, the *dominium* was vested in W., and G. was not entitled to reclaim or to a preference in W.'s insolvency. *Commissioner for the Sequestrator* v. *Vos* 87

2. ———— The purchaser of landed property at public auction, when sued provisionally on the conditions of sale for the first instalment of the purchase-money, is entitled to compensate against such instalment the amount of a mortgage bond over the same property of which he was the holder. *Eaton, N. O.* v. *Johnstone* 89

3. ———— The sale and purchase of moveables from an insolvent before insolvency, and moveables remaining in the insolvent's possession on hire, *held*—not sufficiently proved by the production of notarial agreements of sale and purchase, and letting and hiring, and of evidence to show that on the premises of the insolvent the moveables had been pointed out to a neighbour as having been so sold and let. *Rens* v. *Bam's Trustee* .. 89

4. ———— The purchaser of landed property sold at public auction on credit, having paid the whole purchase price in cash to the auctioneer, and such auctioneer becoming insolvent without having paid any of the money to the seller, *held*—entitled to his transfer, the seller having become aware of such payment, and not objecting at the time. *Hare* v. *Kotzé* 94

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5. SALE AND PURCHASE—A sale of immoveable property having been made by an insolvent before his insolvency, and the trustee having called on the purchaser to complete the contract and pay the instalments according to the contract, *held*, that certain judgments obtained by the purchaser against the insolvent before the actual sequestration might be pleaded in compensation in part payment of the purchase price. But notwithstanding this and tender in the action to give transfer on payment of the purchase-money, the claim in reconvention, claiming transfer on payment of the difference between what was allowed in compensation and the purchase price, could not be maintained. The *dominium* remained in the insolvent estate, and could be transferred only on full payment of the purchase-money. *Trustee of Smith* v. *Norden* 128

SAMPLE: SALE ON INVOICE AND SAMPLE: *See* INVOICE.

SCHEPENKENNIS: *See* MORTGAGE.

SEAMAN: *See* SHIP.

SECURITY—FOR COSTS, WHERE NOT EXIGIBLE: *See* COSTS.

SELLER—Of a lot of wine, *held*—liable for cellar rent of the wine *pendente lite*, the purchaser having intimated his intention not to keep the wine, and proving that he could have let his cellar on lease but for the stowage of the declined wine there. *Murray* v. *De Villiers* 88

SEQUESTRATION—Of vendor's estate, no conveyance *coram lege loci* to the purchaser having been effected, vests the *dominium* of the immoveable property in the Master of the Supreme Court, and ultimately in trustees, for the benefit of creditors. *Harris* v. *Trustee of Buissinne* 105

SERVICE—Of summons at the counting-house of a partnership firm is not service against one of the partners individually. *Terrington* v. *Simpson* 216

2. ——— Personal service on one partner of an alleged partnership, not at the place of business of the firm:—*Held*, no service as against his alleged partner. *Haupt* v. *Spaarman and another* .. 216

3. ——— Partners absent from the colony may be served with their summonses at the place of business of the firm in the colony. *Meintjes & Co.* v. *Simpson Brothers & Co.* 216

4. ——— A copy of the protest for non-payment of a bill of exchange, need not be served on the defendant. *Rens* v. *Van der Poel and another* 233

5. ——— Service of summons is itself a sufficient demand for payment. *Redelinghuys* v. *Theunissen* 258

SERVITUDE—AQUÆDUCTUS—How constituted against singular successor of grantor. [No decision.] *De Wet* v. *Cloete* 291

2. ——— AQUÆ-HAUSTUS—Implies a right of way to the fountain, and cannot be impaired by a merely personal agreement. Where a river separates the dominant and servient tenements, there is a right of passage over a bridge, notwithstanding that the properties had formerly been one, and that in their sale or division the conditions were that a then standing bridge should be removed by the purchaser of the lower place and that no bridge servitude should exist. The defendant having thereupon removed the bridge accordingly, but afterwards put up a temporary

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bridge:—*Held*, that the personal agreement cannot limit the real right, the executors of the vendor, in transferring, having constituted, by the terms of such transfer, an unqualified right of servitude to the drink water. *Hawkins* v. *Munnik* 291

3. SERVITUDE—HABITATIO—An authority by a proprietor of land to another person to reside there "as long as you may think fit to occupy it," does not constitute an irrevocable right of occupancy for life, but gives a right revocable on reasonable notice. *Dickson q.q. Ellis* v. *Biddulph* 292

4. ——— An agreement by a vendor to give the purchaser "the free and uninterrupted use of the water for the mill-stream, during the period of four hours every alternate day," &c., "which right of water shall be a perpetual servitude on the aforesaid mill-stream and property;" the vendor himself possessing the right of damming up the water to a limited extent only, and leading a certain quantity therefrom, entitles the purchaser to claim only a right of servitude over the limited right in the stream such as the vendor possessed it. *Cloete* v. *Ebden* 293

5. ——— A question as to a disputed right of servitude may indirectly be tried by a personal action for damages, but the proper remedy is by a real action against all claiming right on the alleged servient tenement to have the servitude declared in favour of the dominant tenement, and the possessors and occupiers of the servient tenement indicted from interrupting the enjoyment of the servitude. *Saunders* v. *Executrix of Hunt* 295

6. ——— In an action to declare a right of way, the Court gave judgment for the defendant on the grounds that no transfer had been made to the plaintiff or his predecessors of the ground now claimed by him for the road, nor any grant of a servitude of road in their favour recorded in the Land Registry Office; and that it had not been proved that the defendant, at the time he received his transfer, had any notice or knowledge of the right of road promised to plaintiff by the former owner. *Parkin* v. *Titterton* .. 296

7. ——— The decree of the Court of Landdrost and Heemraden, regarding the right to water of co-proprietors, is not to be considered as abandoned by the parties, or rendered ineffectual by prescription, because its arrangements, by which the parties be enabled to enjoy the use of the water, were never adhered to nor carried into effect; the several parties having throughout enjoyed the proportions of the water to which by the decree they were found entitled. *Du Toit* v. *Malherbe* 299

SHALL AND MAY—In legislative language are imperative. *Roger-son, N. O.* v. *Meyar and another* 38

SHALL BE LAWFUL—In legislative language is discretionary. *Ibid.*

SHERIFF'S RETURN—Allowed to be impeached by affidavit. *Terrington* v. *Simpson* 216

SHIP—Where the parties had completed the sale of a ship and the purchaser had received actual delivery and taken upon himself the ownership of the vessel in so far as it is possible for him to do so before the completion of the requisites of the Registry Act, the *periculum* of the ship is transferred to the purchaser, even if the price has not been paid to the vendor. *Terrington* v. *Simpson* .. 110

2. —— A bond specially hypothecating shares in a ship belonging to the port of Cape Town, duly registered in the custom-house on

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the day it bears date, and likewise registered in the Public Debt Registry two days after its date:—*Held*, valid, although the proper indorsement on the ship's register of the particulars of the mortgage was not made until after the debtor's insolvency, the vessel being absent from Table Bay at the date of the mortgage, and the indorsement having taken place within thirty days of her return. *In re Carter* 341

3. SHIP—Attachment of ship by process of Supreme Court by consignees of goods which have been sold in a foreign port to repair damage caused by stress of weather, and sale of ship under process of Admiralty Court, where the ship had been attached for seamen's wages, with the consent of the Supreme Court. *In re "The Black Swan"* 350

4. —— Tradesmen who had furnished articles necessary for the safety of the ship of such a nature that the master might have granted a bottomry bond for the price, entitled, with the consent of the master, representing the owner, to be paid out of proceeds in the hands of the sheriff paid to him out of the Admiralty Court, after the satisfaction of the decrees of that Court. [*Sed vide* note.] *Ibid.*

5. —— A seaman who had been prevented by a rule of form from joining with the other seamen in the action for wages in the Admiralty Court not entitled, without the owner's consent, to be in like manner paid in preference from the proceeds in the sheriff's hands, the master having no authority to grant a bottomry bond for seamen's wages. *Ibid.*

6. —— An agent of a ship claiming a balance of account against the ship, in which account were included disbursements which would by law have entitled a creditor for such disbursements to a hypothec, and likewise charges and money advanced, which would not have entitled a creditor to a hypothec, the Court, without deciding whether his character as agent did or did not deprive him of the hypothec which, if not agent, he would have had, and whether such hypothec extended to anything beyond necessary repairs effected on the block of the vessel:—*Held*, that inasmuch as all these claims for which a hypothec could be pretended together amounted to a less sum than that received by the agent on account of the agency of the ship, he was bound to apply such amount, indefinitely received, for the benefit of the ship, in the first place to discharge the claim secured by hypothec, which was accordingly extinguished. *Norden* v. *Solomon q.q. Assignees of Charke* 377

SHIP AGENCY: *See* AGENT.

SIGNATURE—When denied may be proved instanter in a provisional case. *Dieterman* v. *Curlewis*; *Norden's Trustee* v. *Butler* 257, 289

2. —— Double costs given as a penalty for *malâ fide* denial of signature. *Deneys* v. *Daniel* 258

STAMP.—Where a bond for 500*l.* already advanced and for future advances was stamped originally for 500*l.*, no objection to the bond can be taken on this ground, the stamp law making no provision for stamps on bonds for uncertain amounts. *In re Carter* 335

SUCCESSION—INTESTATE: *See* INTESTACY.

SUMMONS—In a provisional claim the summons must aver the endorsement by the payee of a bill of exchange. *Moore* v. *Alexander* 231

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2. SUMMONS—It is not necessary in a provisional claim against the indorser of a bill of exchange to allege in the summons that the bill had been presented to the acceptor and that payment had been refused. *Rens* v. *Van der Poel and another* 233

3. ———— In a provisional claim against the acceptor of a bill of exchange payable at a particular place, the summons must contain an allegation of presentment at such place. *Simpson Brothers* v. *Allingham* 233

4. ———— In a provisional case against the drawer of a bill of exchange, the summons must contain an allegation of presentment to the acceptor. *Norton* v. *Speck and another* 239

5. ———— The copy of the promissory note served with the summons on which an indorsee claims provisional sentence must contain a copy of the indorsement through which title is acquired. *Wolhuter* v. *Van Hellings* 255

6. ———— Plaintiff having withdrawn a provisional summons, cannot proceed anew until the costs of the former summons have been paid. An offer of such costs into Court on the day of second summons is insufficient. *Simson & Co.* v. *Fleck* 255

7. ———— Provisional sentence refused on a promissory note, in respect that the summons did not describe the note on which the claim was founded, but merely stated its date. *Hovil & Mathew* v. *Saunders and another* 256

8. ———— A summons taken out on the day the note sued on became due, is defective. *Thalwitzer* v. *Sparmann* 289

————, SERVICE OF: *See* SERVICE.

————, TENDER OF TRANSFER IN: *See* TRANSFER.

SURETY—Right of action against sureties can only arise upon the obligation as entered into by them. Where defendants were sureties to a bond dated 20th March, 1820, and the mortgagor subsequently executed another bond dated 25th April, 1825, reciting the former bond but not affecting it, and where the mortgagee of the bond of 1820 died, and her heirs summoned the sureties on the second bond, which had alone been assigned to them. *Held*—the sureties were not liable on such second bond. *Van Oosterzee* v. *McRae q.q. Carfrae & Co.* 3

2. ———— A surety is discharged by the creditor giving up the security under which he became surety, without taking any other and good security in lieu thereof. *Ibid.*

3. ———— A surety to a bond binding himself for the payment of the capital sum not liable for the interest. *Dreyer* v. *Smuts* .. 3

4. ———— A surety may point out goods of the debtor, and insist on their being taken in execution. *Serrurier* v. *Langeveld* 3

5. ———— The taking of sureties by Government from collectors of the revenue, does not diminish or impair the legal hypothec of Government on the property of such collectors. *In re Insolvent Estate of Buissinne*; *Van der Byl and another* v. *Sequestrator and another*; *Croeser* v. *Sequestrator* 4, 309, 310

6. ———— The creditor's failure to cause a special mortgage to be registered, discharges the sureties. *Rousseau* v. *Bierman* .. 5

7. ———— A surety may be discharged by the creditor taking a less effectual obligation from a co-surety than that agreed on and originally set forth in the bond. *Ibid.*

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8. SURETY—Whether a surety who had renounced the *beneficium excussionis* is discharged by the creditors giving up a *pignus prætorium* obtained from the debtor. [Not decided.] *Low* v. *Spengler* 5

9. ——— Whether a surety, also bound as a joint principal debtor, is discharged by creditor's release of a *pignus prætorium* on the estate of the original debtor, whether acquired before or after the suretyship's obligation was entered into. [Not decided.] *Cloete* v. *Bergh* 6

10. ——— A surety is not necessarily released by the special mortgage given by debtor being annulled and set aside as an undue preference under Proclamation of 6th September, 1805. *Nisbet & Dickson* v. *Thwaites* 5

11. ——— A surety who has bound himself only for a certain time is not liable after the expiration of that time (even though he has bound himself as joint principal debtor), when no demand was made nor the principal debtor proved to have become insolvent within such time. *Van der Byl* v. *Malherbe* 5

12. ——— A wife married in community of property cannot be bound as a surety without her husband's consent. *Executors of Morkel* v. *Heirs of Morkel* 6

13. ——— A surety is not released by reason of another interposing in his stead, without that other thereafter signing the undertaking. *Horn* v. *Loedorlf & Uxor* 6

14. ——— A surety, although also co-principal debtor, held discharged by the creditor having lost the special mortgage in the bond through neglect to register. *Kotze* v. *Meyer* 6

15. ——— Provisional sentence against a surety on a judgment obtained in an action to which the surety was no party, refused. *Sutherland* v. *Snell* 7

16. ——— A surety having renounced the benefit of excussion, is not released by the creditor's refusal to take a bond from him and cede the debt, or to discuss the debtor. Release in this way is only the privilege of simple sureties, and not of those who have renounced the benefit of excussion. *Overbeek* v. *Cloete* .. 7

17. ——— A surety signing conditions of sale under renunciation of the usual benefits, *held* provisionally liable. *Orphan Chamber* v. *Sertyn and others* 7

18. ——— Notice given by a surety before having paid the debt, and becoming the holder of the bond, to the debtor to pay such debt, not sufficient notice to enable the surety to demand from the debtor after having paid the debt and obtained cession. Fresh notice necessary. *Neethling q.q.* v. *Minnaar* 8

19. ——— A surety held not liable, after rehabilitation, to a co-surety who paid the principal before the confirmation of the liquidation account of his co-surety's estate, and had not then ranked on such co-surety's estate. *Semble*—The co-surety's rehabilitation is also a bar to a fresh claim thereafter by the principal creditor who had previously claimed on the insolvent estate of such co-surety. *Brink* v. *Van der Reit* 8

20. ——— A surety *indemnitatis*, having paid the debt, cannot, without cession of action, maintain a claim of damages against the sequestrator for negligence in executing the sentence against a preceding ordinary surety. *Meyer* v. *Schonnberg, N.O.* 8

21. ——— Right of surety to reclaim amount of bond paid, on the

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ground of non-registration of such bond, barred by novation, transaction, and *res judicata*. The Court was of opinion (Wyld, C.J., *dubitante*) that but for such acts the principle laid down in *Kotzé* v. *Meyer* (p. 6), as to the release of the surety on the non-registration of a special mortgage by the creditor, would have applied in this case, although the bond here was one of general mortgage. *Meyer* v. *Low* 8

22. SURETY—A person having engaged to become surety under special mortgage of certain property, is not bound to execute a surety bond without such mortgage. Right of action against such surety is dependent upon the obligation as entered into by him. *Du Toit's Trustees* v. *De Kock and others* 12

23. ——— Eight sureties having engaged, in mutual guarantee, each for one-eighth share, and two of the sureties becoming insolvent, the remaining six were held bound to each other in one-sixth, notwithstanding the guarantee of one-eighth. *Cloete* v. *Bergh* .. 13

24. ——— Sureties to a bond of general mortgage released by creditor's non-registration of the bond. *Watermeyer q.q.* v. *Theron and another* 14

25. ——— Where a debtor's obligation was to pay a certain amount, and if not paid within the stipulated time to pay in addition 5 per cent. for collection, and the surety thus bound himself: "I accept to pay the amount hereof as my own debt," the surety held not liable for the penalty. *Steytler* v. *Saunders* 15

26. ——— A letter of guarantee held binding on sureties. *Eager* v. *Clarke and another* 15

27. ——— There were twenty-five sureties for 1000*f.* each, for a sum of 25,000*f.*, which sum, after a payment in reduction by the principal debtor of 5000*f.*, and by eight of the sureties of 8000*f.*, became 12,000*f.* Plaintiff (also one of two sureties for the principal debtor in another bond), a ninth surety, paid this balance, took cession of the bond, and brought an action against defendant, a tenth surety, for one-thirteenth share of the 12,000*f.*, being one-twenty-fifth of the 20,000*f.* unpaid by the principal debtor and a proportion for four insolvent sureties. Defendant tendered one-twenty-fifth of the 12,000*f.* *Held*—he was liable for one-twenty-fifth of the 20,000*f.*, but not, under the stipulations of the bond, liable for deficiency caused to plaintiff by the insolvency of the four sureties. *Du Toit* v. *Vos* 16

28. ——— Where a bond of suretyship for the proper discharge of duty by a Government officer ("that be *shall* faithfully," &c.) did not bear the date of its execution. *Held*—that the sureties were thereby entirely discharged from liability; it being impossible for the Court to fix any date at which liability could be held to have arisen. *Colonial Government* v. *Matthiessen's Executors and another* 18

29. ——— A bond-surety, who having paid the debt due by the principal debtor, had obtained cession of the bond from the creditor, cannot sue provisionally on a deed of indemnity by the defendant holding him, the surety, harmless in case of such payment generally for whatever sum he might have to pay; the payment being incapable of proof without evidence extrinsic of the deed of indemnity, and this although the summons alleged a payment of a specific amount on account. *Cloete* v. *Eksteen* .. 20

30. ——— Possession of a bond by one of two sureties, with an ac-

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knowledgment endorsed on such bond by the creditor that he has received payment of the whole from this one, is not sufficient evidence of payment by such surety to enable him to claim provisional sentence against his co-surety for the moiety. *Neethling* v. *Hamman* 20

31. SURETY—A surety, being also a co-principal debtor, is entitled equally with the principal debtor to the notice stipulated for in the bond. *Willems* v. *Schendeler* 20

32. ——— Where sureties bind themselves for the due performance of a contract by their principal, who fails so to perform it, it is no answer to an action against such sureties by the party with whom the principal contracted, that the sureties, having never been themselves called upon by him to perform the contract, were not further liable. *Churchwardens D. R. Church, Uitenhage* v. *Meyer and another* 21

33. ——— Sureties for the payment of the purchase amount of a farm, and all that "*aard en nagel vast is*" (all that is attached by earth and nails) are not liable for moveables (*i.e.*, fustage) sold at the same time with the farm. Where the undertaking of suretyship mentioned 30,000*f.* as such purchase amount, but the declarations of sale and purchase fixed it at 23,510*f.* (the difference being for fustage) the sureties were held liable for the lesser amount only. *Du Tvit's Trustees* v. *Smuts' Executors and another* 24

34. ——— Sureties held liable in interest from the date of the obligation of the principal debtor, and not merely from the date of demand upon him; a tender only "*a tempore litis contestata*" therefore held insufficient to carry costs. *Ibid.*

35. ——— What does not amount to such a satisfaction by or discharge of principal debtor, as will discharge the surety. *Bell N. O.* v. *McDonald and another* 28

36. ——— It is no defence to a provisional claim on a bond against a surety and co-principal debtor who had renounced the *beneficium divisionis et excussionis*, that the creditor had made no claim on the estate of the debtor, who subsequently became insolvent, and was therefore unable to give cession of action; the debtor's estate being admittedly insufficient to have met any preferent claim that might have been made upon it. *Varmaak* v. *Cloete* 35

37. ——— Action brought to compel performance of undertaking entered into by sureties. *Wolhuter* v. *De Villiers and others* .. 37

38. ——— Joint sureties may be sued in one action, so may a principal debtor and sureties, even when they have renounced the benefit of excussion, or a principal debtor and sureties bound by separate deeds. *Rogerson, N. O.* v. *Meyer & Berning* 38

39. ——— It is no bar to the commencement of an action against sureties by the creditor, that there are still unrecovered assets of the principal debtor's insolvent estate, on which, when recovered, the creditor would have a right of preference. *Ibid.*

40. ——— Sureties cannot plead in defence the non-excussion of funds belonging to the principal debtor but not within the jurisdiction of the Court. *Ibid.*

41. ——— Sureties to the fisc for the collection of public revenue are not entitled to the *beneficium excussionis*, and therefore cannot plead the exception of non-excussion. *Ibid.*

42. ——— Sureties to a penal bond may be proceeded against by the creditor without prior excussion of the principal debtor. *Ibid.*

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43. SURETY—Recourse may be had against sureties without the creditor making demand on the principal debtor for payment of the debt when it became due; nor giving notice for the debtor's default. *Rogerson, N. O.* v. *Meyer & Berning* 38

44. ——— Sureties to the fisc (not being entitled to the *beneficium excussionis*) are not discharged from their obligation where the creditor does not cause the bond to be immediately put in suit against the defaulting principal debtor, even though the surety has thereby suffered loss, or though during such *morâ* the principal debtor has become insolvent. *Ibid.*

45. ——— A surety, also a co-principal debtor to a bond given in pledge by the debtor to another bond, not discharged by the non-proof of the pledged bond on the insolvent estate of the principal debtor, whose estate has since been rehabilitated. *Hoef's Executors* v. *De Vos* 53

46. ——— A surety is liable to pay a bond without notice, on the insolvency of the principal debtor. De V. was surety on a bond which stipulated that the principal debtor should be liable to pay on one month's notice. The principal debtor surrendered; and without notice having been given to the surety, he was now called upon to pay the amount of the bond, *held*, that the insolvency of the principal debtor purified the condition as to notice, and made the bond immediately demandable from the surety. *Baard* v. *De Villiers* 55

47. ——— Action brought and judgment recovered by a surety against executors of a person who had promised to hold the surety harmless from any loss on account of his suretyship, but had died without fulfilling such promise. *Neethling* v. *Neethling's Executors* 56

48. ——— A surety held discharged by the creditor's non-registration of bond on the principal debtor's estate. The fact that the principal debtor's estate had not yet been liquidated at the date of action brought makes no difference in the principle to be applied. *Robertson, born Borcherds* v. *Onkruyt* 59

49. ——— Where J. signed a note "q.q." for certain sheep stated in the body of the note "to have been purchased on account of F. C." and defendants bound themselves as sureties, *held*, that they bound themselves for J. personally, and not for F. C., and that J.'s excussion was therefore sufficient to found this action against the sureties, without requiring the excussion of F. C., who, from the terms of the note, could not have been sued upon it as a co-obligant. *Westhuyzen* v. *Pope and another* 60

50. ——— To make registration effectual against a surety there must be a separate and distinct registry in his name as well as in that of the principal debtor. *In re Kotzé* 67

51. ——— A surviving widow, who has not on the death of her husband, duly repudiated or abandoned her interest in the joint estate (even though there be nothing to abandon), *held*, liable when she subsequently acquired property of her own in half the amount of a suretyship for which her husband became liable during the marriage. *Brink* v. *Louw, Widow of Niekerk* 71

52. ——— Action brought by one co-surety against another on an indemnity. *Villiers* v. *Villiers* 71

53. ——— H. passed a bond in favour of De W., and M. bound herself as surety, renouncing the benefits of order and excussion, and the *S. C. Velleianum*. *H.* surrendered. The bond debt was

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proved in his estate, and in the liquidation account the full amount awarded. The trustee had the amount in his possession, but declined to pay it to the mandatory of De W., on account of De W.'s death having put an end to the mandate. The trustee became insolvent, without payment of the amount, or assets sufficient to meet it. Action was now brought against the surety, who defended on the ground that the amount might have been recovered from the trustee. *Held*—that a surety having so renounced the benefits of order and excussion, is not relieved by such omission on the part of the creditor, provided his right of action be not impaired. *Van der Byl* v. *Munnik* 73

54. SURETY—Construction of undertaking of suretyship. *Roos* v. *Coetzee* 74

55. ——— A surety to a bail bond *judicatum solvi* held liable in an action on the bond. *Ogilvie* v. *Norton* 79

56. ——— In an action by D., a co-surety, against J., principal debtor, to recover the amount paid under such suretyship, the defence was that J., the principal debtor, had paid to P., the other co-surety, who happened also to be a deputy sheriff, the full amount of the obligation, in satisfaction of a judgment recovered by the creditor against J., the principal debtor, thereupon. This payment was, however, made to P. after he had already made a return of *nulla bona*, and it was moreover admitted that P. had never accounted to the creditor for the sum so received. *Held*—that no such payment made to P., although he was deputy sheriff, after he had made a return of *nulla bona* on the writ and parted with the possession thereof by returning it to the high sheriff's office, was sufficient to discharge the principal debtor's debt to the creditor, nor to have barred him from suing D. as a co-surety, P. not having paid or accounted with the creditor. Wherefore D. was entitled to recover in this action accordingly. *Devenish* v. *Johnstone* 82

57. ——— Provisional sentence granted against a wife married out of community, who had bound herself *in solidum*, as surety and co-principal debtor for her husband. *Nourse* v. *Steyn, Wife of Griffith* 85

58. ——— The effect of renunciation of the benefit of excussion by, is destroyed by a clause by which the surety binds himself to pay if the debtor is unable to pay. *Muller* v. *Meyer* 2

59. ——— Renouncing the *beneficium excussionis*: *See* EXCUSSION.

60. ——— To appeal Bond: *See* APPEAL.

SUPREME COURT—Has jurisdiction to declare and make effectual a hypothec over property within this colony, forming part of the estate of an English bankrupt, in favour of a creditor whose debt had existed prior to the date of the bankruptcy. *Norden* v. *Solomon q.q. Assignees of Charke* 375

SURVIVOR—Must repudiate or abandon all interest in the joint estate on death of the first dying, to free from liability for first dying's debts contracted during the marriage. *Brink* v. *Louw, Widow of Niekerk* 71

TACIT RELOCATION: *See* LEASE.

TENDER—B., an auctioneer, sold at public auction to C., for account of T., eighty-eight boxes of cigars. At the sale T. informed

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intending purchasers that the boxes contained 1000 each. On delivery they were found to contain from 800 to 810. B. sued C. reckoning the contents at 1000. C. tendered payment reckoning the contents at 810 per box, which tender the Court sustained. *Blore* v. *Chiappini* 96

2. TENDER—A tender of costs, made in the following terms: "Take notice that we have withdrawn the summons issued in the above cause, &c., and your costs thereon when made up and taxed will be paid by 'you' [a mistake for 'us'] on demand": *Held*, insufficient, in respect that the defendant was thereby improperly and peremptorily required to tax his bill of costs, before it had been seen by plaintiffs, and thereafter to demand the costs from the plaintiffs, instead of the costs being offered to him by the plaintiffs. *Simson & Co.* v. *Fleck* 255

3. ——— Where summons is issued against the drawer of a promissory note, without previous presentment for payment, it is sufficient for him to tender to the plaintiff or his attorney the amount of the debt, without costs even of the summons. An offer of payment to the sheriff's officer, who served the summons, unless he had been entrusted with the note by the plaintiff to demand payment, is not a sufficient tender. *Brink* v. *Gough*; *Redelinghuys* v. *Theunissen* 256, 258

4. ——— Where the maker of a promissory note in which no place of payment is specified, no previous presentment having been made, is sued, and by first post after receipt of summons caused a tender to be made:—*Held*, sufficient to free from costs. *Orlandini* v. *Pope* 260

5. ——— Where an accepted acknowledgment is made payable on presentation, the sheriff's service of a summons for the amount is not such presentment, and where the defendant had under these circumstances tendered the amount of the note without costs, the Court upheld his right so to do. *Johnstone* v. *Kotzé* 284

6. ——— Where a tender of the amount of a note not payable at a particular place sued on without previous presentment was not made until the day of hearing, the Court gave plaintiff the costs of the day, though not the costs of summons. *Steytler* v. *De Villiers* 286

——— of Transfer: *See* TRANSFER.

TITLE-DEEDS—DEPOSIT OF: *See* HYPOTHEC.

TRANSFER—Where immoveable property at the Cape was sold in London under a notarial agreement entitling transfer to be made at the Cape, the Registrar of Deeds here was directed to allow transfer accordingly. *In re Twycross & Jennings* 88

2. ——— W., an auctioneer, sold for account of K., certain land at public sale under conditions stipulating that the purchase-money should be paid in three instalments. H. became the purchaser, and paid the whole price to the auctioneer on the day of sale. The auctioneer became insolvent without having paid any of the money to K. H. sued for transfer of the land purchased by him. K. refused to give transfer until he should be paid the amount of the purchase-money in manner stipulated in the conditions of sale. Evidence was given that the defendant K. was made aware the plaintiff H. had paid the whole price at once, and it was *held*, by his not objecting at the time, defendant K. had ratified the transaction. *Hare* v. *Kotzé* 94

3. ——— Where provisional sentence is claimed on a bond in

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which the obligor undertakes to pay the purchase-money of land on transfer being given, the summons should tender such transfer forthwith. *Vouchee* v. *Van Ellewee* 99

4. TRANSFER—Tender of transfer by summons, one day beyond stipulated time for giving the same is bad. *Nordens* v. *Barnes and others* 103

5. ———— Transfer passed before the Registrar of Deeds is necessary to convey the *dominium* of immoveable property. *Harris* v. *Trustee of Buissinne* 105

6. ———— W. A., a foreigner, without having obtained a deed of burghership and unable from poverty to obtain one, having become purchaser of a lot of ground, obtained permission from the governor that transfer might be allowed to pass to him and his son, a minor of ten years of age, believing that he would thus receive the ground to himself. The transfer was effected to W. A., as father and natural guardian of and in trust for his son J. A. Thereupon W. A. erected buildings, partially from funds borrowed under a promise of mortgage, but was unable to effect a mortgage, the ground being registered in his son's name. The Court having found that the son never was intended to have, and had not, any beneficial interest, decreed that the deed of transfer should, in so far as it conveyed any interest be set aside; and W. A. having thereupon obtained a deed of burghership, ordered transfer to be effected in his favour. *Assue* v. *Curator of Assue* .. 148

7. ———— Circumstances under which a transfer of certain lands, by virtue of a general power of attorney, *cum specialibus potestatibus,* but without special authority to sell immoveable property, together with a holograph letter of the principal, was allowed by the Court, without prejudice to the principal's rights. *Moodie* v. *Registrar of Deeds* 190

8. ———— A deed of transfer executed *coram lege loci* by the widow of the grantee, cancelled at the suit of certain persons who had acquired rights to certain shares and subdivisions of the land granted, as having been made by the widow *non habente potestatem. Walker and others* v. *Norden* 359

TRUSTEE—A trustee of an insolvent estate, cognizant of and tacitly acquiescing for thirteen years in a purchase made in the insolvency by the auctioneer employed to sell the estate assets, cannot afterwards refuse transfer, even though the purchase was one originally voidable. *Norden* v. *Trustees of Bonnin* 124

TUTORIAL HYPOTHEC. *See* HYPOTHEC.

UNDERHAND LEASE—Provisional sentence on: *See* LEASE.

UNLIQUIDATED DAMAGES—The allegation of unliquidated damages suffered through want of repairs to a dwelling is no defence to a provisional claim for rent on a lease. *Vowe* v. *Pedder* 169

VARIANCE—Bartman, by bond, bound himself in a sum of £500, and M. and B. bound themselves as sureties for £250 each. B. was summoned individually for £250, without mention of M. in the summons. M. was separately summoned in the same way, without mention of B. The declaration was filed against both as if they had been co-defendants in one summons. Exception was taken to the declaration on the ground of variance, and sustained by the Court. *Rogerson, N. O.,* v. *Meyer and another* 38

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2. VARIANCE—Where, in the declaration, plaintiff claimed the price of a wagon and oxen bought at auction by the son for the father, the defendant, on the condition to be paid for in cash on delivery, and at the hearing it was proved the plaintiff said, "I will take your bid, upon condition that I shall keep the wagon until your father either pays me or gives me security," *held* to be a variance between the declaration and the facts proved, and ground for absolving defendant from the instance. *Harris* v. *Ruthven* .. 191

3. ———— A variance between the promissory note signed and the copy served is immaterial, *i.e.*, where the note was signed "Baumgardt," the "dt" being more like "ett," and the copy served was "Baumgarett." *Brink* v. *Napier* 259

4. ———— It is a material variance between a promissory note and the copy served to describe the note as for "the sum of and ten pounds," instead of "the sum of one hundred and ten pounds," &c. *Atkinson* v. *Norden* 270

WAGES—A workman in a wagon-maker's shop has not the preference for wages to which a domestic servant is entitled. *Mulder* v. *Creditors of Lacable* 348

2. ——— Attachment, under process of Admiralty Courts of a ship for seaman's wages. *In re "The Black Swan"* 350

3. ——— A seaman who had been prevented by a rule of form from joining with the other seamen in the action for wages in the Admiralty Court is not entitled, without the owner's consent, to preference on the proceeds in the sheriff's hands of the sale of the ship, the master having no authority to grant a bottomry bond for seamen's wages. *Ibid.*

WAR—Where a Kafir war prevented the defendant from fulfilling a contract to deliver Kafir gum, *held*, that the plaintiff was nevertheless entitled to damages for breach of contract. *Norden* v. *Shaw* 150

WARRANTY—B., an auctioneer, sold at public auction to C. for account of T., 88 boxes of cigars. At the sale T. informed intending purchasers that the boxes contained 1000 each. On delivery they were found to contain from 800 to 810. B. sued C. reckoning the contents at 1000. C. tendered payment taking the boxes as containing only the lesser number, which tender the Court sustained. *Blore* v. *Chiappini* 96

2. ———— Plaintiffs sold to defendants, through a broker, 184 chests Canton Bohea, to sample, at 9*d.* per lb., as per invoice, and 264 chests Fokeen Bohea, in the same way, at 1*s.* Samples were shown, sale completed, and invoices delivered. There was no mention of the F. B. in the invoices. Defendants tendered 9*d.* per lb. all round. Plaintiffs insisted on 1*s.* for the F. B., or a relinquishment of the sale. Defendants then took delivery without mention of price. The Court found the 264 chests to be Fine Canton Bohea worth 10*d.* per lb. That the defendants had bought on faith of sample and warranty combined, had taken delivery of the 264 chests under the plaintiffs' warranty that it was F. B., and were entitled, on discovering it was not, to refuse to pay for it as such. It therefore absolved defendants from the instance; but suggesting that on an action for F. C. B. at 10*d.* plaintiffs would recover, judgment was taken by consent for 9*d.* for C. B., and 10*d.* for F. C. B. *Waters & Herron* v. *Phillips & King* 99

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3. WARRANTY—Where a farm, the real value of which consisted almost entirely in the buildings on it and the arable and garden ground adjacent thereto, was sold as it stood, and the seller, in the course of conversation, when he had not the title deeds at hand, accidentally, and without any intention to deceive or mislead the purchaser, stated that the place was 600 morgen in extent, whereas in truth it was only 422 morgen, and it was clear that the purchaser had not been induced by this statement to give a greater price than he would have agreed to do if he had been told that the extent of the place was 422 morgen. *Held*—that this statement could not in law be considered as a *warrandice* that the place did contain 600 morgen, or as affording to the purchaser any ground, in respect of the principle on which the *actio quanti minoris* is founded, for claiming from the seller a deduction from the purchase price. *Fry* v. *Reynolds* 153

WATER-RIGHTS—How a servitude *aquæductus* is constituted against singular successor of grantor. [No decision.] *De Wet* v. *Cloete* .. 291

2. ——— How far Government remain *dominus fluminum*, and how far of small rivulets. [No decision.] *Ibid.*

3. ——— Regulations made in pursuance of a judgment and recognised by legislative authority, are sufficient to determine the rights of the parties affected thereby. *Ibid.*

4. ——— A servitude *aquæ haustus* implies a right of way to the fountain, and, where the properties are on different sides of a river, to a footbridge over the river. Such unqualified right of servitude cannot be impaired by a merely personal agreement. *Hawkins* v. *Munnik* 291

5. ——— A decree of the Court of Landdrost and Heemraden regarding the right to water of co-proprietors is *res judicata* of a competent Court as regards these proprietors and their successors. Even though there might be ground for supposing that the decree was founded, in part, on an error in fact, it would be *res judicata* until set aside in a regular action of reduction. Such a decree is not to be considered as abandoned by the parties or rendered ineffectual by prescription, because its arrangements, by which the parties should be enabled to enjoy the use of the water, were never adhered to nor carried into effect; the several parties having throughout enjoyed the proportions of the water, to which by the decree they were found entitled. *Du Toit* v. *Malherbe* .. 299

WAY—A right of way to a fountain is implied in a servitude *aquæ haustus*, and cannot be impaired by a merely personal agreement. *Hawkins* v. *Munnik* 291

2. —— The proprietor of a piece of ground sold portion of the ground in seven lots, a plan being exhibited at the sale on which a road was marked, and the auctioneer stating that the road would run as exhibited on the plan. In course of time, the plaintiff became purchaser of all the lots. One of the lots only was transferred from the original owner. Afterwards the proprietor sold the remaining portion of the ground, and gave transfer to the defendant's vendor, who transferred to defendant. No mention was made in either of the title deeds of any road or passage between the seven lots originally sold and the remainder. The defendant having obstructed the alleged road, the Court, on action brought by the plaintiff, gave judgment for the defendant, on the ground that the ground claimed for the road had never been transferred to the plaintiff or his predecessors, nor had any

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grant of a servitude been recorded in the land registry prior to the transfer to defendant's vendor, nor had it been shown that defendant when he received transfer had any notice or knowledge of the right of road promised by the original owner. *Parkin* v. *Titterton* 296

WIFE—A woman married in community of property cannot be bound as a surety without her husband's consent. *Executors of Morkel* v. *Heirs of Morkel* 6

2. —— Provisional sentence granted againt a wife married out of community, who had bound herself *in solidum* as surety and co-principal debtor for her husband (since excussed by insolvency) on a bond in which she renounced her *beneficia*, without production of evidence to show that she was not unduly influenced by her husband in the execution of the bond, which was *ex facie* for his benefit, and without requiring the appointment of a *curator ad litem* to act for the wife. *Nourse* v. *Steyn, wife of Griffiths* .. 85

3. —— A wife has no *persona standi in judicio*, although married out of community of property and with the exclusion of the *jus mariti*. *Prince q.q. Dieleman* v. *Anderson* 393

4. —— Where a husband, married in community of property, directed by will that his wife "shall be entitled to one moiety or half of my property"—*Held*, that the wife was entitled under the matrimonial community to one-half the common property, and under the bequest to one-fourth more, being the moiety of his property left her by her husband in addition to the matrimonial half. *Caffin et Uxor* v. *Heurtley's Executors* 395

WILL—Where a mutual will gives the survivor the usufruct of the children's portion, he or she is bound to defray the expenses of the children's education out of the interest of such portion, and if such interest is exceeded the survivor must make good the balance. *Prince q.q. Dieleman* v. *Berrange* 393

2. —— L. and his wife created by mutual will a *fidei commissum* in favour of their grandson and his children, at the same time empowering the survivor to cancel the *fidei commissum* and to give the capital sum to their grandson, free and unencumbered, on certain specified conditions of prudent behaviour and marriage. L. died. The surviving widow by codicil provided for the cancellation of the trust on conditions other than those referred to in the mutual will. *Held*—that on the ground of such variance the codicil was void. *Lutgen's Trustees* v. *Lutgen's Executors* 394

3. —— Spouses, by mutual will, appointed the survivor sole heir, subject to the usual condition of education, &c., of the children of the marriage until majority, or marriage, when their paternal or maternal portions should be paid out to them. By mutual codicil, under the reservatory clause, they thereafter excluded two daughters from heirship, awarded them their legitimate portions only, and directed that, in lieu of such daughters, the daughters' children should be heirs of the testators. Action was brought by the husband of one of the daughters to have the codicil declared void, on the ground that it contained an institution of heirs, and derogated in this respect from the appointment of heirs in the mutual will. *Held*—that the codicil was valid. The testator's daughters took under the mutual will merely as legatees for whatever sum was left them over and above their

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legitimate portion, and it was open to the testators to charge such legacies by codicil. *Brink q.q. Breda* v. *Voigt* 394

4. WILL—Where the testator, married in community of property, bequeathed to his wife, in a notarial mutual will: "One moiety or half-part or share of *his* property, together with the houses and the whole of *his* furniture, situate Nos. 8 and 35, Dorp Street, Cape Town, with the *whole* of the slaves" (these houses and the slaves, in fact, forming part of the property in community); and further desired that "the whole of *his* property both real and personal, with the exception of the houses, furniture, and slaves hereinbefore mentioned, should be sold by public auction;" and afterwards made a codicil wherein he altered his will as follows: "I do hereby cancel and make void such part of my will as applies to my present residence in Dorp Street, No. 8, as also my furniture and slaves given to my wife, and I direct that the same shall form part of my general property; the same to be disposed of by my executors named in my said will, and *that my wife shall be entitled to one moiety or half of my property, both real and personal*," *held*—[MENZIES, J., *diss.*] that by virtue of the matrimonial community the wife was entitled to one-half of the common property, and under the codicil to one-fourth more, being the moiety of his property left her by her husband, in addition to the matrimonial half. *Caffin et Uxor* v. *Heurtley's Executors* 395

5. —— C. and his wife, by mutual will, instituted the survivor sole heir, on the usual condition of giving the children of the marriage an education, &c., and of maintaining them until majority or marriage, and then paying them such portion as they might be entitled to in equity and according to the condition of the estate. The survivor, in case of re-marriage, to make inventory and sale, and pass a bond "for the moiety of the whole of the proceeds" in favour of the children. The wife died. The husband caused an inventory to be made, and the joint estate taxed at Rds. 44,360. The only child married, and received Rds. 11,090, and under the belief that that was all he was entitled to receive, gave an acknowledgment in writing in full of all demands for maternal inheritance. Subsequently he brought an action for Rds. 11,090 more, and obtained judgment, but with interest reckoned only from the date of summons; the Court holding the father to have been a *bonâ fide* possessor during the interval, and therefore not liable for interest *perceptæ et consumptæ ante litem constitutam*. *Cleeuweek* v. *Berg* 396

6. —— Where a widow, who had been married in community of property, received her matrimonial half, and for several years continued to receive certain usufruct bequeathed by her husband, according to a liquidation account framed by the executors named in a will made by her late husband and herself, the Court, by a majority (Menzies, J., *diss.*), *held*—that after her death her executor was entitled to impeach this account, as based on an erroneous construction of the will. *Reis* v. *Executors of Gilloway* 401

7. —— Where a testator (who had been previously married) had bequeathed certain legacies to his god-children in a will made jointly with his first wife, and which legacies had been specially reserved in his will made jointly with his second wife, *held*—that such legacies should be charged against the testator's separate estate and not the joint estate. And further, that a certain amount chargeable during the marriage against the joint estate, had, by the terms made use of in the will by a testator "ex-

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pressly desiring that the same may be strictly observed by *his* testamentary executors," become chargeable on his separate estate. *Reis* v. *Executors of Gilloway* 401

8. WILL—Where, in the terms of a mutual will made by two persons married in community, the survivor was entitled to the usufruct of the inheritance of a minor child, under the burden of maintaining and educating the minor, and the mother, surviving, had for some years allowed the interest of the minor's inheritance, except a small annual amount for his maintenance, to accumulate in the hands of the Master of the Supreme Court as guardian of the minor, who at the same time administered his property; the Court *held*—that the plaintiff, who had married the widow in community, and who had also for several years after his marriage with her allowed the interest to accumulate as before, was entitled to bring an action for the recovery of the interest accumulated both before and after his marriage, as being property of the community. *De Smidt* v. *Burton, N. O.* 401

9. —— Acquiescence by the heirs of a testator in the widow's entering on the administration of the estate of her deceased husband, and continuing therein until after the sale and final liquidation thereof, does not bar such heirs from coming into Court to set aside a notarial deed in which the testator professed to have reinstated the executrix as executrix after having by codicil revoked the mutual will whereby she had been originally appointed. *Horak* v. *Horak* 402

10. —— Where a testator a few days before his death called in a notary, and declared to him his "wish to have a former codicil annulled, and to hold his testament executed by him and his wife, as of full force," and the notary "certified" this to the Court, the Court *held*—that this notarial instrument did not amount to a *de præsenti* revocation of the codicil. *Ibid.*

11. —— B. and his wife, by mutual will, left to their son a farm, on the death of the longest liver. *Held*—that the survivor could not, after having adiated, alter this disposition by his separate will. *Britz* v. *Britz's Executors* 431

12. —— On a question whether children claiming under a mutual will in the form given are entitled on the death of the mother, the first dying, to claim their share of maternal inheritance calculated according to the value of the estate at the death of the mother, or at the date of their majority, or at the date of the sequestration of the survivor's estate. *Semble*—the shares of heirs major at the death of the first dying must be calculated according to the value of the whole estate at that date. The shares of heirs minor at the death of the first dying must be calculated according to the value of the estate when they attain majority. *In re Wium* 431

13. —— How a person under curatorship, by reason of insanity, should, during a lucid interval, proceed if he wish to make a will. *In re Kemp* 435

15. —— A mutual will by a husband and wife is valid and effectual as the will of the surviving husband, notwithstanding his having married a second wife in community of property. *Ludwig* v. *Ludwig's Executors* 449

16. —— A will is not invalidated by parol evidence that the testator declared himself to be intestate. *Ibid.*

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17. WILL—A. and B. made a will which was informally executed and admittedly void. Plaintiff and his wife (daughter of A. and B.) had subsequently to their death signed a paper approving, as far as they were concerned, of this informal will. But it being proved that they acted in ignorance, the estate of A. and B. was declared intestate. *Roche Blanche* v. *Widow Pas and others* .. 453

18. —— A surviving spouse, appointed executrix under a mutual will, but who had not acted in that capacity, may decline to act. *Fouche* v. *Fouché's Executors* 458

19. —— A will is valid, though it contains no direct appointment of heir. What construed into a bequest of property not specifically described as against the heirs *ab intestato*. *Batt* v. *Batt* 408

20. —— The *onus probandi* what property is conveyed by the will lies on the party claiming, though defendant in the case. *Ibid.*

21. —— K. married S. in community. By mutual will they bequeathed to their sons certain farms, to devolve upon them on the death of the longest liver, who was to enjoy the usufruct. The wife died, the husband re-married, and enjoyed the usufruct until his death, after which event the second joint estate was surrendered. The trustees in the insolvency refused transfer to the sons of the first marriage on the ground that the farms had come into the second community. But the Court ordered transfer, and condemned the trustees personally in costs. *Kotze* v. *Kotze's Trustees* 414

22. —— R. on his deathbed sent for a notary and showed him a paper writing, which he declared to be his last will, in the presence of two witnesses. It was unwitnessed, and contained a legacy to the plaintiff. The notary informed R. of the informality, suggested the preparation of a new will, and took shorthand notes of the testator's intention. The testator suddenly died before these notes were extended. The legatee brought an action for her legacy, and the Court, after hearing the evidence of two witnesses as to its acknowledgment, upheld as the declaration of the testator's will the paper writing which he had first produced to the notary. [*Sed vide* Ordinance 15, 1845.] *Wilhelmina* v. *Robertson* 416

23. —— A father cannot by will, by placing his daughter under curatorship, deprive her after majority of the administration of her affairs, and the power of making a will. *Van der Spuys* v. *Maasdorp* 420

24. —— On the death of testators who have made notarial wills the original will must, to meet the provisions of Ordinance 104, be taken from the notary's protocol, and be enregistered with the master; and even if more wills than one by the same testator be so offered, the master is bound to enregister the same, leaving the question of their relative validity to be decided by the Court on action. *In re Herron* 423

25. —— S. and R., spouses, by mutual will appointed the plaintiff, in case they both died without issue, heir of the whole joint estate on the death of the longest living. S. died. His widow re-married M., and executed with him a second mutual will, revoking the former mutual will of herself and her deceased husband in so far as regarded her share of the joint estate, declaring the plaintiff entitled only to the share of her late husband on her decease, under a certain deduction. She afterwards paid over such half

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to plaintiff, and took from him a full written discharge:—*Held*, that this barred the plaintiff from an action to set aside the second mutual will and to claim under the first. *Wessels* v. *Executors of Rensberg* 425

26. WILL—Will set aside on the ground that the testator, at the time he executed the will, was not in his sound and proper senses, and was legally incompetent to execute any will. *Bekker* v. *Meyring* .. 436

27. —— Certified copies of wills registered with the master are evidence, without the production of the registered originals. *Ibid.*

28. —— Where on appeal the appellant sought to object that some of the heirs interested in the will had not been made parties to the cause:—*Held*, that this should have been excepted in the Court below, *initio litis*. There are certain matters in bar of which the Court will take notice, although not pleaded below, but that this was not one of them. Where one of the appellants, founding on this objection, was the executor, it was his duty to have *tempestive* called on the other heirs to intervene in the action below. *Ibid.*

29. —— It is not essential that all parties interested in a will should be made parties to a suit brought by one or more of them; but the decision of the Court being, as regards parties not intervening, *res inter alios acta*, cannot bind them. *Ibid.*

30. —— It is not necessary, to make a will good under the proclamation of 12th July, 1822, expressly to declare that the testation is under its provisions. *Shaw, Children of*, v. *Trustees and Creditors of* 443

31. —— Where a testatrix directed that in the event of her daughter opposing a *fidei-commissary* disposition of a child's portion in her favour, and demanding her legitimate portion free and unincumbered, the residue of the said child's portion, after deducting the legitimate portion, should go to and devolve upon the children of the said daughter, the grandchildren of the testatrix:—*Held*, that this direction extends only to such children as were alive at the death of the testatrix, and not to those born after her death. *Bresler* v. *Kotze's Executors* 444

32. —— H. died, leaving a close will, appointing certain executors. His heirs objected to the issue by the master of letters of administration on the ground that they intended to have the will set aside "for want of solemnities required by the law of this country in closed or sealed wills." The master withheld letters of administration; but on application by the executors, the Court (Menzies, J., *diss.*), *Held*, that such an objection was not one of those referred to by Ordinance 104, s. 20, and directed the Master to grant letters of administration accordingly. *Postea*, the heirs (before taking any initial proceedings by action) applied for an interdict to restrain the executors administering until the question of the validity of the will had been decided. But the Court unanimously refused the interdict, intimating, however, that after summons issued or declaration filed, an interdict would be granted on proof that the executors' administration might be prejudicial to the heirs' interests. *In re Hoets* 459

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DECIDED IN

The Supreme Court

OF THE

CAPE OF GOOD HOPE,

AS REPORTED BY THE LATE

HON. WILLIAM MENZIES, ESQUIRE

(SENIOR PUISNE JUDGE OF THE SUPREME COURT);

AND

REVISED AND EDITED BY

JAMES BUCHANAN,

ADVOCATE OF THE SUPREME COURT.

COMPILED BY

EBEN. J. BUCHANAN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BURTON, J. *Left for New South Wales,* 1832.

KEKEWICH, J.

MUSGRAVE, J. *Appointed Oct.* 12, 1843.

Volume III. contains Decisions on the following subjects:—

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INJURIA VERBALIS. } Equivalent to Libel and Slander.
INJURIA LITERALIS.
TUTORS AND MINORS.
CURATORS AND WARDS.
ARREST, REAL.
ARREST, PERSONAL.
CIVIL IMPRISONMENT.
ARBITRATION AND AWARD.
SHIPPING.
INSURANCE, MARINE.
INSOLVENCY.
INTERDICT.
PLEADING.
EVIDENCE.
COSTS.
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11. ——— In an action in which, under the 50th section of the Charter of Justice, there was a right of appeal to the Privy Council, the plaintiff, on the day he obtained judgment, took out execution and attached defendant's goods. The Court on motion set aside the writ of execution with costs. The defendant having noted his appeal, a new writ was allowed to be issued, on the plaintiff's giving security in terms of the charter. *Lawton* v. *Rens* 483

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12. APPEAL—The Supreme Court refused to reverse the decision of a magistrate upon a ground of defence which was not set up in the Court below, and which did not arise on the face of the record. *Maynard* v. *Adams* 496

13. ——— Where process of the Supreme Court is sued out under the 190th Rule of Court, to bring under review the proceedings of an inferior Court, the summons must state the grounds upon which the party seeks to have the proceedings set aside or corrected. A statement that the judgment "was erroneous and contrary to law" would ordinarily be insufficient. *Stephens* v. *Anderson* .. 511

APPRENTICESHIP—Indentures of apprenticeship of a minor, not signed by her widowed mother her natural guardian, declared null and void. *Riggs* v. *Calff* 76

2. ——— The resident magistrate has no jurisdiction to cancel indentures of apprenticeship of minors on the ground of the intended removal to another place of the master. But no decision given as to the jurisdiction of the magistrate to prevent the removal of the apprentices from the town, the residence of their parent, without such parent's consent. *Hurter* v. *Isaac* 85

ARBITRATION—An agreement to submit all future disputes to the arbitration of uncertain persons cannot be enforced by the Court, unless the parties have themselves, in the agreement, assessed the amount of damages for non-performance. *Schmidt* v. *Francke* .. 156

2. ——— Indemnification from the plaintiff ordered by arbitrators to be given to the defendant, means merely his personal indemnification, and not good security from third parties. *Wells* v. *Mackenzie* 156

3. ——— Award set aside (after being made a rule of Court, but without notice to applicant, the deed of submission not stipulating non-notice, and after writ of execution issued) for certain informalities in the appointment of umpire and in his hearing the case in the absence of one of the parties. *Dietz* v. *Pohl* 156

4. ——— An agreement by a principal debtor to refer certain accounts to arbitration does not bar his surety from debating such accounts. *Orphan Chamber* v. *Cloete* 157

5. ——— A clause in a deed of submission whereby the parties "covenanted and agreed that the award should be made a rule of Court," is sufficient to entitle either party on motion to have the award made a rule of Court without the consent of the other, unless the motion were opposed in respect of objections to the validity of the award itself, which must be stated *instanter*. *Groenewald* v. *Smith* 158

6. ——— Award set aside for irregularities by umpire, viz., non-notice to one of the parties, and founding his decision on the notes taken by the arbitrators, without himself hearing the witnesses. *Groenewald* v. *Smith*, *Wood* v. *Gilmour*, and *Fryer and others* v. *King* 158, 159, 160

7. ——— Award set aside where made by umpire without notice to parties. Where the award is so set aside on the 29th of August, and the reference lasted till the 30th of September, it is not competent to remit the matter to the same arbitrators on the same reference to make a new award. *Fryer and others* v. *King* 160

8. ——— It is not competent for one of the parties to a submission to revoke and cancel it *invito altero*. *Twentyman* v. *Chisholm* 161

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9. ARBITRATION—Where, by a clause in the deed of submission, the parties bound themselves to attend and produce such books as may be in their respective possession or power touching the matters in difference, *held*, that this only referred to such books, &c., as the arbitrators required. *Twentyman* v. *Chisholm* .. 161

10. ——————— Defect in award for want of finality and for having been made in the absence of one of the parties, cannot be taken advantage of before the Supreme Court where the parties have renounced appeal, unless such renunciation be first shewn to be invalid. *Ibid.*

11. ——————— It is competent for the Court to sustain an award in part, and set it aside in part. *Ibid.*

ARREST—PERSONAL—Damages given against a peace officer, a deputy sheriff, for making an illegal arrest. *Cloete* v. *Bergh* 109

2. ——————— ——————— Power of the Supreme Court to grant arrest *judicio sisti* in a suit between two passengers, foreigners, for acts done at sea. [Not decided.] *Wallace* v. *Hill* 122

3. ——————— ——————— Arrest of *peregrinus in perigrinum jurisdictionis fundandæ causâ*. [Not decided.] *Hornblow* v. *Fotheringham* 122

4. ——————— ——————— Arrest sued out by a person not being an attorney set aside as irregular. *Smith* v. *David* 122

5. ——————— ——————— No person can legally be taken from his dwelling-house (which includes certain of the premises connected with the house) in execution of a writ of a civil nature, except for recovery of debts due to the fisc. *Nisbet & Dickson* v. *Richardson* 122

6. ——————— ——————— A summons or notice served or given according to law, to appear to stand trial on a criminal charge before a competent Court, protects the person during his coming and remaining for the purpose of obeying the summons or notice, and during his returning from so doing. *Richardson* v. *Nisbet and Dickson and the Sheriff* 123

7. ——————— ——————— It is competent for the Court or a Judge at Chambers, on proof by affidavit that a debtor whose estate is under sequestration and has not got his certificate, intends to leave the colony, to order, if they should see cause, a writ to be issued for the arrest of the debtor until he should give bail not to leave the colony. *Still* v. *Gilbert* 124, 260

8. ——————— ——————— The sheriff, on making arrest, must, if security is offered, take it not merely for the amount of the debt and costs mentioned in the writ, but also for £35 or £40, to cover further costs. *Stoll* v. *Brandt* 126

9. ——————— ——————— Arrest dissolved and bail bonds discharged, where the affidavit of the party at whose instance the arrest of A. and T. was made, set forth as the cause of action an assault on him "by one or other of them," which, being in the alternative, was held not to be within the requirements of Rule of Court No. 8. *Roberts* v. *Andrews & Tucker* 127

10. ——————— ——————— What averments in the affidavits sufficiently comply with the requisition of the 8th Rule of Court, and warrant the issuing and execution of a writ of arrest. *Thompson* v. *Andrews*, and *Norden* v. *Oppenheim* 128, 141

11. ——————— ——————— Where a defendant has been arrested, and the

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arrest set aside for defect, he can be arrested a second time by the plaintiff on the same cause of action. *Roberts* v. *Tucker* 130

12. ARREST—PERSONAL—Where a witness, having attended an examination *de bene esse* to which he had not been subpœned, was arrested, *Held*—That having done so *sua sponte*, and not having been summoned, he was not privileged from arrest. *Ibid.*

13. ——— ——— The mere contemplated departure of a debtor from the jurisdiction is sufficient to warrant arrest; the departure need not be fraudulent or to defeat plaintiff's claim. *Ibid.*

14. ——— ——— An unliquidated claim for damages, the amount of which was estimated on oath in the affidavit at £50, is sufficient foundation for arrest, unless the claim is frivolous, or the Court sees no probability of £50 damages being awarded. *Ibid.*

15. ——— ——— A warrant of attorney to institute proceedings, &c., for damages "for an assault sustained by me on board of the said brig," without specifying the name of the person against whom the action was to be instituted, held sufficient. *Ibid.*

16. ——— ——— Arrest set aside, where the facts stated in the affidavit on which the arrest was founded did not, in the opinion of the Court, afford evidence of an immediate departure from the colony. *Norden* v. *Sutherland* 133

17. ——— ——— The defendant may, under Rule of Court No. 135, anticipate the day of appearance, and, on notice, apply to have the arrest dissolved. *Master of the Supreme Court* v. *A. B.* 134

18. ——— ——— Arrest of defendant, about to proceed to Natal, then a district of this colony, for the *bonâ fide* purpose of performing the duties of an office to which he had been appointed by the Government of this colony, which, in truth, was the plaintiff and creditor in this case, set aside. *Ibid.*

19. ——— ——— Plaintiff barred *transactione* from having recourse to the process of arrest against defendant. *Ibid.*

20. ——— ——— In an arrest to answer for damages sustained in respect of certain slanderous words, *held* that the cause of action was sufficiently set forth in the affidavit and writ, notwithstanding that neither the alleged defamatory words nor their substance or effect was therein set forth. *Norden* v. *Oppenheim* 141

21. ——— ——— Arrest of ship-master, to found jurisdiction. *Montgomery* v. *Green* 171

22. ——— REAL—An arrest made by a creditor of the cedent of a debt (assignment whereof had been completed by delivery of the instrument having an act of cession thereon) subsequent to the cession, is ineffectual to attach a debt in the hands of a cedent's debtor. *Smuts* v. *Slack and others* 102

23. ——— ——— Arrest on money held good. *In re Insolvent Estate of Van As* 102

24. ——— ——— A prior *pignus prætorium* preferent to posterior special hypothec. *In re Lond* 102

25. ——— ——— A *pignus mobilium* completed by tradition, is preferent to a prior tacit legal general hypothec. A *pignus prætorium*, constituted by attachment, is equivalent to a *pignus mobilium*, completed by tradition. *In re Woeke* 103

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26. ARREST—REAL—An attachment against the property of the husband, who was about to depart from the colony, obtained by the wife, who had commenced proceedings for a separation *à mensâ et thoro*, for the security of her half of the common property. *Rabie* v. *Rabie* 103

27. ——— ——— The messenger to the magistrate was proceeding to lay judicial attachment on the goods of E., when V. S. bound himself by bond in the messenger's favour for all goods "that had been seized." E. became insolvent, and the goods in question came into the possession of the trustee, who awarded no preference to the attaching creditor. The messenger brought an action against V. S. for delivery of the goods. *Held* (on appeal), that the seizure not having been completed, V. S. was not liable under the terms of this bond. *Moore* v. *Van Schoor* 103

28. ——— ——— A surety in a bond granted in terms of the 43rd Rule of the Magistrate's Court, is not liable either for the goods or the debt when in consequence of sequestration, the goods attached have been taken possession of and their proceeds distributed by the trustee, to the exclusion of the attaching creditor. *Ibid.*

29. ——— ——— When an attachment has been completed the *pignus prætorium* is not affected by the messenger's not taking a security bond, or not leaving a person in charge of the goods, or not removing them. *Ibid.*

30. ——— ——— ——— It is not competent to a creditor to attach money paid into Court on behalf of his debtor, before judgment is given or the debtor has judicially accepted the tender. *Dickson & Burnie* v. *Richardson* 105

31. ——— ——— ——— A sale of immoveable property, attached in execution of a judgment of the Court, confirmed, notwithstanding an irregularity arising from want of advertising in the *Gazette*, as required by Rule No. 111. *Master of the Supreme Court* v. *Tennant* 107

32. ——— ——— As to what degree of preference, if any, is acquired by attaching the proceeds of a sale of the debtor's chattels in the hands of third parties, the debtor having subsequently surrendered his estate. *In re Carter* 108

33. ——— ——— An attachment of a ship and owner's goods granted to found jurisdiction. *Wollaston & Co.* v. *Hunt* 110

34. ——— ——— A ship-arrest, to found jurisdiction, granted at the instance of an English creditor on an English contract, on a vessel at anchor in Table Bay. *Dunell & Stanbridge* v. *Van der Plank* 112

35. ——— ——— Sheriff's seizure gives no preference in the distribution where there is a seizure on two writs, the execution being not quite contemporaneous but on the same day. *Vide* Order No. 3, 1844, limiting the right of the posterior creditor to share *pro rata*. *In re Wools* 114

36. ——— ——— Attachment of *jus ad rem* to immoveable property set aside under the following circumstances:—W. purchased, and partly paid for, certain immovable property, of which he did not, however, get transfer. G., a creditor of W., got judgment, and sued out a writ the exigency of which could not be satisfied. G., without any special order of Court, sued out another writ, by

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virtue of which the aforesaid immovable property was attached. W. surrendered. His trustee got transfer and sold the property, and awarded G. a preference under the last attachment. A bond creditor objected. The Court set aside the preference accordingly, on the ground that W. had only a *jus ad rem* which could not be attached by a writ proper to attach only a *jus in re*. *Maynard* v. *Gilmer's Trustee*.. 116

37. ARREST—REAL—The proceeds of a writ of attachment on a judgment obtained by a creditor of an insolvent whose debt was contracted subsequently to the sequestration, ordered to be paid over by the messenger of the Magistrate's Court to the trustees of the insolvent debtor. *Trustees of Johnstone* v. *Hendrickse* .. 118

38. ——— ——— Moveable property of A., in the possession of B., and apparently in B.'s ownership, is not liable to be taken in execution of a fine levied on B. in a prosecution at the suit of the Crown, even though it might be liable to be taken in execution of B.'s debts allowed to be contracted on the faith of the property being that of B. *Arend* v. *Hendrickse* 119

ARTICLED CLERK: *See* ATTORNEY.

ASSETS—Misappropriation or misapplication of the assets of an insolvent estate by one of several trustees without the knowledge and consent of his co-trustees, does not discharge such co-trustees from their liability to the creditors for such assets. *In re Crause* 257

ASSIGNMENT—A debtor, carrying on business under the control of inspecting creditors, appointed by resolution of creditors at a meeting summoned by the debtor, interdicted from doing any act, in the management of his business, or disposal of his property and funds, without the consent and approbation of the said inspecting creditors. *Watson & Chase* v. *Lawton* 337

ATTACHMENT: *See* ARREST, REAL.

ATTORNEY—Whether an attorney has a lien for his costs on the sum recovered from his client's adversary, not merely as against his client, but third parties and the Crown. [Not decided.] *Arend* v. *Hendrickse* 121

2. ——— An arrest sued out by a person not an attorney, set aside as irregular. *Smith* v. *David* 122

3. ——— The costs of an attorney for proceeding in the name of a dead man not allowed, where the death was known to him. *Heartley* v. *Poupart* 394

4. ——— Provisional sentence refused on an attorney's bill of costs where it did not appear that the same had been taxed in the presence of the party, or after due notice given him to attend the taxation. *De Wet* v. *Meyer* 397

5. ——— An attorney employed by an executor to recover a debt due to the testator, has a preference on the amount of the judgment in the sheriff's hands for his costs of this action, but not for his account against the executor for other business done not in connection with the testator's estate. *Thomas* v. *Barker*.. 397

6. ——— *Semble*, an attorney for a wife, defendant in an action for divorce, is entitled to have his costs incurred before the decree out of the common estate if the defendant is not entitled to any estate, either separate or as her share of the community. *Hablutzel* v. *Hablutzel* 405

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7. ATTORNEY—Provisional sentence refused to an attorney against his client, the plaintiff in a previous action, on a taxed bill for the costs in that action, which the defendant therein had been condemned, but had failed to pay. Separate notice to his own client to attend the taxation is necessary. *Dickson* v. *Geldenhuys* 409

8. ——— No service as an attorney's clerk can be taken into computation as qualifying for admission as an attorney, except service subsequent to the date of the written contract required by the 149th Rule. *In re Berrangé* 458

AUCTIONEER—An auctioneer held discharged from liability on a vendue note signed by one of the heirs of an estate, handed over and accepted by the executor, to be kept until the amount of the said heirs' inheritance should be ascertained, by reason of the delay of the executor in liquidating the estate and returning the note. *Orphan Chamber* v. *Aspeling* 414

2. ——— Where a sale was withdrawn from an auctioneer (employed by one only of three co-trustees, the other two afterwards objecting to his employment), and entrusted to another auctioneer who held the sale, the first auctioneer protesting:—*Held*, that such first auctioneer was not entitled to full commission on the sale, just as if he had conducted it. *Lee & Meurant* v. *Daniell's Trustees* 574

3. ——— Where an express contract as to commission for holding a sale has been made between a resident magistrate, as representing the master, and an auctioneer, the Court, on the repudiation of such contract by the master, has no means of affording relief, except by regular action between the parties. *Valentyn* v. *Swartz* 584

BILL OF COSTS: *See* COSTS.

BILL OF EXCHANGE—Protest for non-payment of a bill drawn by the master of a vessel on the English owners, and production of the bill, sufficient proof of its non-payment to found on the bill here. *Chiappini & Co.* v. *Jones* 181

2. ——— Proof of debt on an insolvent estate, on a dishonoured bill of exchange, allowed for only the balance found to be due on the transaction, and not for the amount stated in the bill. *In re Herron* v. *Searight & Co.* 260

3. ——— Proof of presentment of a bill of exchange by the production of a notarial protest for non-payment, in which presentment is alleged, cannot, in a provisional case, be negatived by parol evidence. *Hovil & Mathew* v. *Poultney* 381

4. ——— Parol evidence is not competent in a provisional case to prove the dishonour of a bill of exchange. *De Ronde* v. *Zeyler* 382

BOND—CONSIDERATION—M., as agent for K., senior, sold certain slaves to K., junior, with B. as surety; K., junior, to pass a bond in favour of S., who was to advance money to K., junior, who was thereupon to hand over the money to M., who was to satisfy another debt due by K., senior, his principal. The bond was duly executed, and the slaves transferred to K., junior; but the money was never paid by S., who died shortly afterwards. M. paid the price of the slaves to the creditor of K., senior, and claimed the amount from S. S.'s trustee sued on the bond. De-

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fendants pleaded no consideration.—*Held*, that there was an equivalent to payment by S. to defendants, and that plaintiff could recover, however matters might stand between M. and the estate of S. *Stoll's Trustee* v. *Kriege and Bosman* 443

2. BOND—A magistrate has no jurisdiction to give judgment for interest for an amount within his jurisdiction on a bond for a sum beyond his jurisdiction, the validity of the bond and bond debt being denied. *Vermaak* v. *Cruywagen* 465

——: *See* MORTGAGE.

BONUS—No *strykgeld* (bonus) allowed to a trustee, also a creditor in an insolvent estate, on his purchase of immovable property belonging to the estate, of which he was the mortgagee. *In re Neethling* 228

BREACH OF CONTRACT: *See* CONTRACT.

BURGHER FORCE: *See* FOREIGNER.

CARICATURE—Damages and costs as between attorney and client awarded against a defendant who, by means of sketches published for the express and avowed purpose of annoying him and hurting his feelings, had caricatured the plaintiff. *Lewison* v. *Philips* 37

CHARTER OF JUSTICE, s. 50: *See* APPEAL.

CHILD—CUSTODY OF INFANT—MAINTENANCE: *See* MINOR.

CIRCUIT COURT—The 132nd Rule of Court, requiring documents put in proof by the plaintiff to be scheduled, did not formerly apply to cases in the Circuit Court. But this Rule of Court has now been amended. *Widow of Nieuwenhuizen* v. *Nieuwenhuizen* 385

——————: *See* RECORD.

CIVIL IMPRISONMENT—Process of execution against the person of a debtor is not issued as a matter of course in respect of a return of *nulla bona*, to satisfy any judgment which has been obtained against him, but is only granted *causa cognita*, after the debtor has been summoned to show cause against it. *Master of the Supreme Court* v. *A. B.* 139

2. —————————— An unconfirmed liquidation account, not being a final sentence, a decree of civil imprisonment for the deficiency in the estate refused; and where, *per incuriam*, a decree had already been granted at the instance of another creditor, the Court stayed execution. *Nisbet & Dickson* v. *Richardson* 143

3. —————————— Civil imprisonment on a sentence of the resident magistrate refused. Ordinances Nos. 33 and 34 giving magistrates no jurisdiction to pass sentence on which civil imprisonment can be enforced. [But Act 20, 1856, sect. 16, now gives such jurisdiction.] *Muter* v. *Satchwell* 143

4. —————————— Return of *nulla bona* sufficient *primâ facie* proof of no movable property. It is then for defendant, if he avers it, to prove possession of such property. *Langeveld* v. *Tyrholm* 143

5. —————————— Appeal not competent against a decree of civil imprisonment in execution of a judgment not appealed against. Civil imprisonment granted, notwithstanding petition for leave to such appeal. *Nisbet & Dickson* v. *Richardson* .. 144

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6. CIVIL IMPRISONMENT—An insolvent is entitled, after the liquidation account has been confirmed, to oppose a decree of civil imprisonment by objecting to the legality of the claim proved in his estate. *Villiers* v. *Le Riche* 144

7. ——————— Civil imprisonment suspended during sequestration of estate, and insolvent liberated. *In re Hoffler* 144, 209

8. ——————— In an application for civil imprisonment the defendant must be served with a copy of the sentence, as well as a copy of the writ and the sheriff's return of *nulla bona*; and where a copy of the sentence had not been served, the defendant granted fourteen days to see it. *Wolff* v. *De Villiers* 144

9. ——————— Plaintiff obtaining a decree of civil imprisonment against a debtor not entitled, in respect of sect. 19, of the publication of the late Court, dated 3rd April, 1823, to costs. *Valentyn* v. *Olivier* 145

10. ——————— *Pluris petitio* (over demand) does not vitiate summons as to what is really due. *Curlewis* v. *Mesham*.. 145

11. ——————— Where a husband had failed to carry out one of the provisions of a notarial deed which the Court had decreed to be executed, and in which the trust had been accepted by one only of three intended trustees, the Court, by a majority [Menzies, J., and Kekewich, J., Wylde, C.J., *diss.*] *held*, that a claim for civil imprisonment could be maintained by this one, without his intended co-trustees, to enforce compliance with the terms of the decree. *Twentyman and another* v. *Hewitt* 145

12. ——————— B., as executor of K., obtained judgment in his capacity against D, and sued out the writ in his capacity. Thereafter, in his individual capacity, he obtained a decree of civil imprisonment. D. sought to set aside the decree on that ground, but unsuccessfully. *Duqui* v. *Bergh* 146

13. ——————— Decree of civil imprisonment having been obtained by a partnership firm, and one of the partners having died before its execution, the decree was revived after special summons in the name of the surviving partner. Such revival cannot be had on motion. *Dickson* v. *Richardson* 146

14 ——————— Summons for civil imprisonment must aver issue of writ of execution on judgment, and sheriff's return of *nulla bona*. *Ingram & Brothers* v. *Theunissen* 148

15. ——————— The debtor must point out to the sheriff all his disposable property. *Beryh q.q.* v. *Stadler* 149

16. ——————— Decree of civil imprisonment, on an order for payment of costs on a certain condition, refused, as the condition not having been purified, the rule was not absolute. *Boniface and Ley* v. *De Lima* 149

17. ——————— Decree of civil imprisonment refused where the costs of a former unsuccessful application had not been paid. *Van der Bergh* v. *De Lima* 150

18. ——————— Summons for civil imprisonment held bad for misjoinder, where founded on two separate judgments against separate defendants in two separate actions, although for the same debt. *Van den Berg* v. *Van Dyk* 150

19. ——————— Civil imprisonment decreed at the instance of an assignee of only half of a debt, which half such

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assignee had paid in his capacity as surety, and taken cession of. *Schmitz* v. *Olivier* 151

20. CIVIL IMPRISONMENT—Decree of civil imprisonment granted in 1840, on a judgment obtained in 1834, the execution and return of *nulla bona* on which judgment were also made in 1834, although it was objected that the judgment was superannuated and ought to be revived. *Brink and another* v. *De Villiers* 151

21. ——————— Half-pay officer B. obtained damages against a half-pay officer for slander. The latter surrendered his estate without satisfying B.'s claim. B. prayed civil imprisonment, and proved that defendant's half-pay was £91 5*s.* per annum. The Court, in the circumstances of the case, granted a decree, execution to be stayed upon quarterly payments of £10. *Blake* v. *Barrow* 152

22. ——————— Where defendant, against whom a decree of civil imprisonment was sought, was in receipt of pension and half-pay amounting to £485 per annum, the Court stayed execution on payment of £250 per annum. *Dickson & Co.* v. *Rogers* .. 154

23. ——————— Where defendant was in receipt of a salary of £140 per annum, the Court stayed execution of a decree of civil imprisonment on payment of one-third of such salary in quarterly instalments. *Sutherland* v. *Bird*.. 155

24. ——————— Where the proper form of application for a decree of civil imprisonment is by motion, and a summons has been issued instead, it is competent nevertheless to make the motion, as the summons must be held equivalent to a notice of the motion. *Manuel's Trustee* v. *Norden* 526

CODICIL: *See* WILL.

COLLECTOR OF CUSTOMS—Before an action is brought against the collector of customs for acts done in the exercise of his office, notice must be given as required by the statute of 8 & 9 Vict. c. 93, s. 79. *Chiappini & Co.* v. *Field, Collector of Customs* 549

COLLUSION—Evidence to prove collusion not allowed to be led where no such collusion had been specially averred in the pleadings. *Smuts, Trustee of Neethling* v. *Neethling* 283

COMMISSARIAT DEPARTMENT—Persons contracting with the commissariat department are not bound, unless they have expressly or tacitly so agreed, to submit their claims, when disputed, to the final decision of a commissariat board of claims, whatever may be the custom of the department requiring such submission; but may have recourse to a court of law for the purpose of determining such claim. *Sands* v. *Cooper, Deputy Assistant Commissary General* 566

COMMON CARRIER—A post contractor held liable, as a common carrier, for loss sustained through the wrong delivery of goods entrusted to him. *Borradaile* v. *Mocke* 466

COMPENSATION—Allowed of inheritance of minor grandchildren with debt of their father due to grandfather. *Richert's Heirs* v. *Stoll & Richert* 69

2. ——————— Every creditor has the right, under sect. 28 of Ordinance No. 6, 1843, to plead compensation, after the surrender of his debtor's estate, in respect of any debt due by the insolvent to him, and against any debt due by him to the insolvent, in respect of and against which he might have pleaded compensation in a question with the insolvent, if he had been solvent, provided

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the creditor, when he gave credit, or when the cause of his debt accrued, had not notice of the order for sequestration having been made, or of any act of insolvency in virtue of which such order shall have been made. *Hiddingh, Trustee of Manuel* v. *Norden* .. 288

3. COMPENSATION—Where plaintiffs had obtained a judgment against R., they were held not entitled to plead compensation in respect of this judgment against the costs of a rule obtained by R. against plaintiffs, in so far as regarded the claim of R.'s attorney. *In re Richardson* 354

4. ——— Compensation must be specially pleaded. *Still* v. *Norton* 365

5. ——— It is incompetent, in answer to a liquid claim based on a judgment of the Court, to oppose a plea of compensation founded on an illiquid counter-claim for damages, which claim both plaintiff and defendant have agreed to refer to arbitration. *Manuel's Trustee* v. *Norden* 526

6. ——— A son suing as, and in the capacity of, the general agent of his father, is not entitled to state a debt due by himself individually in compensation with the debt claimed by his father from defendant, unless he could prove that defendant had consented to the father as debtor for plaintiff's said debt by agreeing to the delegation of that debt to the father. *De Villiers* v. *Commaille* 544

COMPOSITION: *See* INSOLVENCY.

COMPULSORY SEQUESTRATION: *See* INSOLVENCY.

CONDITION—Where a condition as to time was of the essence of the contract, the time having been allowed to elapse without the condition being performed, the plaintiff held not entitled to recover. *Burd* v. *Townsend* 421

CONDITIONS OF SALE—Where conditions of sale stipulated that purchasers neglecting to settle in a certain time would be liable to a charge of 5 per cent. for collection, and frequent demands by a collector were made, the Court allowed the charge. *Jones* v. *Rhynhout* 463

2. ——— Where conditions of sale required the purchaser to pay, *inter alia*, the expenses of the conditions of sale, and five lots were at first put up separately and not sold, and then put up in one lot and sold to M., held that he was only liable to pay for one and not five sets of conditions of sale. *Maynard* v. *Adams* 496

3. ——— Where at the sale of certain erven by the Government, one of the conditions was that a plentiful supply of water would be furnished to each erf, and loss was suffered from the want of water, damages were given against the Government. *Attorney-General q.q. Colonial Government* v. *Hart* 558

CONTRACT—Non-implement by plaintiff discharges defendant from the contract. *Steytler* v. *Low* 217

2. ——— Effect of non-implement *tempestive* not remedied by subsequent tender of performance. *Ibid.*

3. ——— Completion of a contract by an insolvent after insolvency is for the benefit of his creditors. *Thomson Brothers & Co.* v. *Cumming & Nourse* 249

4. ——— A contract between W. and B., that B. should not carry

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on, during A.'s lifetime, any business whatever at a particular place, not invalid as an improper restraint on natural liberty. Damages recovered in an action for breach of such a contract, and a perpetual interdict granted to restrain from future breach. *Willet* v. *Blake* 343

5. CONTRACT—B. was master of a vessel which, trading to China, called in at Table Bay. T. resided in Cape Town. They made a joint adventure of certain goods to be sold by B. in China. B. being obliged to leave China for Europe, left the goods for disposal by the purser of his vessel, in China. On his way to Europe he called in at Table Bay, paid the estimated moiety of the adventure, with interest to date, to T., who entered into a written obligation to repay the amount of loss, if any, which might have arisen upon the sale of the goods, provided such loss should be made clearly to appear by the production at Cape Town of proper accounts and vouchers, within twelve months from the date of such written obligation; and provided also that such loss had not been occasioned by any neglect or mismanagement of the said B. It afterwards appeared that T.'s loss on the adventure was £30, and it was proved that this loss had not been occasioned by any such neglect or mismanagement. But the account showing the loss was not produced to defendant until twenty days after the expiration of the twelve months fixed by the obligation. On this ground T. resisted the repayment. *Held*, that time having been of the essence of the contract, T. was not liable. *Burd* v. *Townsend* 421

5. ——— C. & S. agreed that S. would not, under a penalty of £600, carry on the trade of a butcher or aid and assist any other person or persons whatsoever to carry on the said trade, within a certain rayon. S., thereafter, *bonâ fide* donated to his minor son a certain sum to enter into a butchery co-partnership with another party within the said rayon. *Held*, a breach of contract; but no special damage being proved, nominal damages awarded. *Cawoods* v. *Simpson* 542

5. COSTS—Where the defendant in an action for libel pleaded the general issue and a plea of justification, the Court, in granting absolution from the instance, gave costs on the general issue, but condemned the defendant to pay to plaintiff the costs incurred by the latter with reference to the plea of justification, the defendant having led no evidence in respect thereof at the trial. *Ryneveld* v. *Bain* 11

5. ——— Tutors entering into litigation concerning the property of minors without the authority of the Court are personally liable for costs, and cannot, if unsuccessful, recover from the minors. *Prince q.q. Dieleman* v. *Berrange* 68, 395

5. ——— The sheriff, on making a civil personal arrest, must, if security is offered, take it not merely for the amount of the debt and costs mentioned in the writ, but also for £35 or £40 to cover further costs. *Stoll* v. *Brandt* 126, 405

5. ——— In respect of section 19 of the publication of the late Court, dated 3rd April, 1823, a plaintiff obtaining a decree of civil imprisonment against a debtor, held not entitled to costs. *Valentyn* v. *Olivier* 145

5. ——— Decree of civil imprisonment refused, on a conditional order for costs. *Boniface and Ley* v. *De Lima* 149

5. ——— Decree of civil imprisonment refused where the costs of a

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former unsuccessful application had not been paid. *Van der Bergh* v. *De Lima* 150, 401

7. COSTS—Any person interested in an insolvent estate succeeding in a motion against a trustee who has not filed his account within the proper time is entitled to his costs. *Norden* v. *Brink* .. 270

8. ——— Compensation cannot be pleaded in respect of a judgment obtained by plaintiffs against R., against the costs of a rule obtained by R. against plaintiffs, in so far as regarded the claim of R.'s attorney in the proceedings respecting the rule. *In re Richardson* 354

9. ——— Security for costs not exigible from a plaintiff who is an *incola* (inhabitant), nor from one who, although no *incola*, has immovable property in the Colony. *Witham* v. *Venables* .. 394

10. ——— Security for costs not exigible from the plaintiff, a military man in service in the Colony, he being, *quoad hoc*, an *incola*. *Dunlevie* v. *Harrington and another* 394

11. ——— The Government held liable to pay costs of suit. *In re Insolvent Estate of Buissinne* 394

12. ——— A trustee is personally liable for costs improperly incurred. *Mybergh* v. *Commissioner for Sequestration* 394

13. ——— An attorney not allowed his costs for proceeding in the name of a dead man where the death was known to him. *Heartley* v. *Poupart* 394

14. ——— Costs of the day allowed where the plaintiff was not prepared with certain proof, and asked for time. *Cloete* v. *Von Manger and others* 395

15. ——— Where the defendant had obtained judgment to be signed against the plaintiff for his default, costs of the first action must be paid before the plaintiff can make application to be allowed to institute a new action. *Van der Liet* v. *Executors of Karnspeck* .. 395

16. ——— Security for costs not exigible from a plaintiff within the jurisdiction, no allegation being made as to his intended departure from the Colony. *Holyoke* v. *Laing* 396

17. ——— A plaintiff having withdrawn a provisional summons cannot proceed anew until the costs of the former summons have been paid. An offer of such costs into Court on the day of second summons is not sufficient. *Simson & Co.* v. *Fleck* 396

18. ——— It is a bad tender of costs to write "take notice that we have withdrawn the summons issued in the above case, and your costs thereon, when made up and taxed, will be paid by us on demand." *Ibid.*

19. ——— Where a promissory note, not made payable at any specified place, is sued on without previous presentment, if the defendant at once tender the amount to the plaintiff or attorney, he will not be liable for the costs of the summons. But such a tender to the sheriff's officer is bad if the officer is not authorized by the plaintiff to receive the amount. *Brink* v. *Gough* 396

20. ——— Provisional sentence refused on an attorney's bill of costs, where it did not appear that the same had been taxed in the presence of the party, or after due notice given him to attend taxation. *De Wet* v. *Meyer* 397

21. ——— An attorney employed by an executor to recover a debt due to the testator has a preference on the amount of the judgment in

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the sheriff's hands for his costs of this action, but not for his account against the executor for other business done not in connection with the testator's estate. *Thomas* v. *Barker* 397

22. COSTS—Double costs granted against a defendant who first denied, and afterwards, on proof threatened, admitted his signature. *Deneys* v. *Daniel* 397

23. —— Where service was not made until four months after due date of a promissory note specifying no place of payment, if the defendant tender payment of the note on presentment made to him thereof, such tender will save him from the costs of the summons, but not when he only makes such tender in Court on the day of hearing. *Redelinghuys* v. *Theunissen* 398

24. ——— The debtor on a promissory note is not liable to the costs of a notice served on him by an endorser, the holder of the note. *Wicht* v. *Faure* 398

25. ——— Where litigants reside in different districts the plaintiff is entitled to bring his action in the Supreme Court, and, if successful, to get Supreme Court costs. *Master of the Supreme Court q.q. Orphan Chamber* v. *Cats* 398

26. ——— A plaintiff refused to consent to allow defendant to avail himself of certain documents at the trial; thereupon the defendant called upon plaintiff by notice to allow him so to avail himself. Plaintiff did not oppose, and the Court granted the motion, but refused defendant his costs of the application, leaving them costs in the cause. *Anderson* v. *Meyer and Maynard* 399

27. —— Husband and wife being married out of community, and the wife's estate having been, after her death, surrendered as insolvent, the husband *inter alia* claimed for an amount of costs which he had paid in an action instituted against his wife, and relating to her separate property. The Court held that this was a loss during the marriage which was to be borne by the husband, under the provisions of the ante-nuptial contract. *Anderson* v. *Meyer and others* 400

28. —— An insolvent, successful in obtaining his rehabilitation, notwithstanding the opposition of creditors, not necessarily entitled to costs of such opposition. *De Lima* v. *Van der Berg* 401

29. —— Costs given against trustees *de bonis propriis* for refusal to make transfer under a will. *Kotze* v. *Kotze's Trustees* 401

30. —— Costs to be paid before again proceeding in the same cause, provided they have been taxed and demanded. *Deneys* v. *Stofberg* 402

31. —— The costs of serving a subpœna by a deputy sheriff out of the Colony or beyond his district disallowed. *Sed quære*, if the witness, though resident beyond the boundary, had been served within the Colony; or if, being resident beyond the boundary, notice had been given to him in an inexpensive manner. *Reis* v. *Muller* 402

32. —— Where a maker of a promissory note in which there is no place of payment specified, by first post after receipt of summons caused a tender to be made, held sufficient to free from costs. *Orlandini* v. *Pope* 403

33. —— Costs not prayed for on the day of order made may be afterwards prayed for, but no costs given for such second application. *Ibid.*

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34. COSTS—Costs given against an executor *de bonis propriis*, on the ground of his unfounded defence to an action. *Norden, Trustee of Beningfield* v. *Brink, Executor of Jaeckels* 403

35. —— Costs given against the guilty wife in an action for divorce by reason of her adultery. *Hablutzel* v. *Hablutzel* 405

36. —— *Semble*, if a wife, defendant in an action for divorce, is entitled to no estate, either separate or as her share of the community, her attorney would be entitled to have his costs incurred before the decree out of the common estate. *Ibid.*

37. —— Costs are in the discretion of the Court. Defendant ordered to pay plaintiff's costs up to date of tender, and plaintiff ordered to pay defendant's costs incurred after tender. *Roscher* v. *Melck* .. 406

38. —— Costs of two counsel allowed. *De Smidt* v. *Blanckenberg* .. 407

39. —— A magistrate's judgment as to costs equally subject to review as his judgment on the merits. *Van den Burgh* v. *Gebhard* .. 407

40. —— Provisional sentence granted on a promissory note where the signature had been previously denial, and the plaintiff had then failed to prove the same, but refused for the costs to which the defendant was put by such denial. *Birkwood* v. *Van Rooyen* 407

41. —— Where an accepted acknowledgment is made payable on presentation, the sheriff's service of a summons for the amount is not such presentment, and where a defendant had under these circumstances tendered the amount of the note without costs, the Court upheld his right so to do. *Johnstone* v. *Kotze* 408

42. —— Where a note was made payable at a particular place "in the month of October," and notarial protest was made on the 22nd November, such protest held unnecessary, and costs thereof disallowed. *Beukes* v. *Van Wyk* 408

43. —— Where a note is made payable at a particular place on a particular day, and is presented on behalf of the creditors at that place and not paid, the creditor is entitled to the costs of such presentment, although the notary have to travel a far distance to make it; but not if the note be duly paid. *Ibid.*

44. —— Where the holder of a note not made payable at a particular place summoned the defendant without presentment, the Court awarded costs to defendant; but, holding that defendant immediately on service should have tendered the amount on condition of the note being presented, which he had not done until the day of hearing, gave plaintiff the costs of the day. *Steytler* v. *De Villiers* 408

45. —— Provisional sentence refused to an attorney against his client, the plaintiff in a previous action, on a taxed bill for the costs in that action, which the defendant therein had been condemned, but had failed to pay. Separate notice to his own client to attend at the taxation is necessary. *Dickson* v. *Geldenhuys* .. 409

46. —— Costs cannot be taken into consideration in estimating the value of a suit in a question of a right of appeal to the Privy Council. *Norden* v. *Oppenheim* 409

47. —— Where an appeal coming before the Circuit Court was withdrawn on an undertaking by the appellant to pay the "legal expenses" of the opposite party, held that such legal expenses were represented by the taxed bill of costs, and did not include items ultra. *Elster* v. *Jennings* 409

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48. COSTS—Costs of giving the stipulated notice to pay up a bond must be paid by the creditor, and not by the debtor on a bond. *Zederberg* v. *Norden* 411

49. ——— Judgment given in a case of damages sustained by reason of fraud, for costs to be taxed as between attorney and client. *Lawton* v. *Rens* 483

50. ——— Costs given against trustees under a deed of separation for inadvisedly defending an action brought by one of the spouses. *Devenish* v. *Peacock and Joseph* 503

COUNSEL—An insolvent under examination before a commissioner is not of right entitled to the assistance of counsel, though as a matter of favour the Court will permit it. *In re Holtman* .. 302

2. ——— Costs of two counsel allowed. *De Smidt* v. *Blanckenberg* 407

3. ——— Where an advocate held a general retainer for F., and afterwards by oversight accepted a particular retainer in an action by C. against F., in which action there was a claim by C. in convention, and F. in reconvention, the advocate declined acting for either. Judgment was given in convention, and the trial of the claim in reconvention postponed. F. asked the Court to assign him the said advocate in the claim in reconvention, which the Court declined to do, but intimated that there would be no impropriety in the advocate's so acting if he chose. *Fairbairn* v. *Chase* 463

4. ——— A complaint having been made to the Court that counsel had refused to act for one of the parties to a suit, owing to his holding a retainer in other interests in a similar action, the judges intimated that this was a matter on which the Court could not, judicially, give any decision or opinion; and that if, at the request of the bar, and to assist it, the judges did give any opinion on the subject, their opinions were not entitled to any weight, except as the individual opinion of barristers who might be presumed to have had some experience in such matters, and who, being now removed from practice, could have no interest in the decision of the question one way or another to bias or prejudice their opinions. *Dobie* v. *Lawton* 514

5. ——— An advocate holding a general retainer for a firm, who had commenced proceedings against a certain defendant, is justified in refusing to accept retainers for such defendant in other cases to which the firm was not a party, but in which the cause of action was the same. *Ibid.*

6. ——— Where the defendant has made default no watching brief is permissible. *Stoll* v. *Crous* 549

CREDITOR—The word "creditor" in sect. 11 of Ordinance No. 64 means one who was a creditor before the order of sequestration is made. *Brink, Trustee of Magodas* v. *Norden* 271

2. ——— A bond creditor, who had given notice calling up the bond, is not, especially before expiry of the term of notice, a creditor *instans et urgens*. *Neethling* v. *Blommestein's Trustees* .. 276

3. ——— Where it becomes necessary under the Insolvent Ordinance to reckon creditors by value, the amount for which each creditor has proved shall be taken, and not the amounts to which their claims may have been reduced by the receipt of dividends. *In re Clarence and Ahlers* 282

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2. ——— The Board of Orphan Masters [the duties of which board now devolve upon the Master of the Supreme Court] cannot be appointed *curator bonis*. *In re Horak* 94

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4. ——— A *curator bonis* appointed to a person in perfect possession of his mental faculties, but in consequence of his deafness in a certain degree ignorant in business. *In re H. P. J. Rensburgh* .. 99

5. ——— Release from curatorship on the ground of recovery of the lunatic. *Steyn* v. *Curators of Wiese*, and *In re Kemp* .. 94, 101

DAMAGES—An unliquidated claim for damages is sufficient foundation for arrest, unless the claim is frivolous, or the Court sees no probability of damages being awarded. *Roberts* v. *Tucker* .. 130

2. ——— Defendant having bound himself to a contract under a penalty of £600, held liable, on a breach of the agreement, in nominal damages, the plaintiff having failed to prove any special damage suffered by him. *Cawoods* v. *Simpson* 542

3. ——— In an action for the purchase price of ground in a village sold by the Government under this condition, that "a plentiful supply of water will be furnished to each erf at the expense of the district, under the usual regulations," in a reconventional claim the defendant proved that such a supply of water had never been enjoyed by him, although he had been in possession for twenty-two years, and that his annual loss from the want of water had been considerable. The Court gave judgment in convention in favour of the Government, and in reconvention against the Government, for damage suffered by defendant. *Attorney-General q.q. Colonial Government* v. *Hart* 558

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DEFAULT—Where a defendant is regularly in default, he cannot on the trial of the case, appear personally or by counsel. *Luck* v. *Owen* 456

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2. ——— Depositions taken in England as to the birth there of a child, received in an action for divorce in proof of adultery of the wife. *Barker* v. *Barker* 380

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5. ——— Costs given against a guilty wife in an action for divorce by reason of her adultery. *Semble*:—If the defendant was entitled to no estate either separate or as her share of the community, her attorney would be entitled to have his costs incurred before the decree out of the common estate. *Hablutzel* v. *Hablutzel* .. 05

6. ——— Action brought by a wife after judicial separation against the trustees under a deed entered into after separation, to recover trust moneys. Such trustees, inadvisedly defending such action held liable in costs. *Devenish* v. *Peacock and Joseph* 503

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DOMINIUM—A sale on credit and delivery of the goods, vests the *dominium* in the purchaser, so that the seller cannot reclaim the goods. *Sequestrator* v. *Vos* 205

2. ——— The *dominium* of immovable property can be conveyed only by transfer *coram lege loci*. *Harris* v. *Buissinne's Trustee* .. 256

DONATION—A donation, of £500, secured by bond of the father's debtor in favour of the father as father and natural guardian of his minor son, for money lent, specially mortgaging the debtor's immovable property:—*Held*, to be a valid donation as against creditors by a father to his minor child: the Court being satisfied that the father was perfectly solvent at the date of the bond; that when he lent the money to the debtor and took his bond he intended to make an irrecoverable donation in favour of the son; that the receipt of the money by the debtor on condition of his granting the bond payable to the father as father and natural guardian of the minor, and the execution of the bond before the Registrar of Deeds, were in law acts of acceptance on the part of the minor sufficient to support the donation until the minor at his majority should be enabled to ratify it; that the taking of the bond, in the manner in which it was taken, with its execution and registration *coram lege loci*, was acceptance in law by the father on behalf of the minor; that even if the donation were one beyond 500 *aurei*, the execution of the bond *coram lege loci* and its registration was a sufficient registration of it; and that the delivery of the amount to the debtor on condition that he would grant his bond in favour of the father as father and guardian was a sufficient delivery of the subject-matter of the donation to transfer it to the minor, and vest him with the *jus in re*. *Elliott's Trustees* v. *Elliott* 86

2. ——— There is nothing contrary to public policy in permitting a solvent father to make a donation to his minor child by deed executed openly *coram lege loci*, and registered in the public registry of deeds. *Ibid.*

3. ——— A donation of land by a master to his servant by an unregistered deed declared effectual so as to bind the donor's executor to effect transfer in favour of the donee. *Melck, Executor of Burger* v. *David and others* 468

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ERROR—Relief granted, on the ground of error, against a judgment given in an action of damages for fraudulent misrepresentations. *Lawton* v. *Rens* 483

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EVIDENCE—Application of a libel to a particular person proved by witnesses; but evidence proposed to be offered of witnesses who had read the alleged libel, but who had not seen its application, refused for immateriality. *Horstok* v. *Boniface and others* .. 2, 380

2. ——— A document which has not been scheduled and annexed to the plea, as required by Rule of Court No. 132, cannot be put in evidence. *Sutherland* v. *McDonald*; *Melck* v. *Albertus* 6, 381

3. ——— In an action for libel facts tending to mitigate damages may be proved under the general issue without being specially pleaded. [*Sed vide Martheze* v. *Van Reenen*, p. 14.] *Moodie* v. *Fairbairn* 14

4. ——— Evidence admitted by the Court after case closed. *Hiddingh, Trustee of Manuel* v. *Norden* 288

5. ——— Plaintiffs had been appointed executors by a codicil. At the trial they could not produce the will or codicil, but produced a second codicil, which recited the will and first codicil and their appointment in the latter, and then proceeded to make further appointments:—*Held*, that the second codicil produced was sufficient proof of title, and accordingly an exception of non-qualification overruled. *Executors of Naude* v. *Executrix of Zier-vogel* 354

6. ——— Where a public book is kept merely for entries of the dates of the payments of a department, an entry in such book is not admissible to shew to whom such payments were made. *Ibid.*

7. ——— An admission in the plea by the wife, in an action for divorce, of having committed adultery, is not sufficient proof *per se* of the adultery. *Wylde* v. *Wylde* 362, 386

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8. EVIDENCE—A foreign instrument admitted as proof of age. *Greeff* v. *Verreaux* 380

9. ———— Depositions taken in England as to the birth there of a child, received in proof of adultery. *Barker* v. *Barker* .. 380

10. ———— A declaration on oath before a notary by a person on his death-bed is not admissible. *Korsten* v. *Cuyler* 380

11. ———— A judgment obtained against an office-holder for a deficiency in the accounts of his office on his own admission, in an action to which his surety was no party, is no evidence to warrant provisional sentence being given for the amount of such deficiency against the party who had bound himself as security for any deficiency which might be caused by the default of such office-holder. *Sutherland* v. *Snell* 380

12. ———— Proof of presentment of a bill of exchange by the production of a notarial protest for non-payment, in which presentment is alleged, cannot, in a provisional case, be negatived by parol evidence. *Hovil & Mathew* v. *Poulteney* 381

13. ———— A notarial act must be produced in evidence of the facts related therein; such facts not being provable by the parol evidence of the notary. *Melck* v. *Albertus* 381

14. ———— Parol evidence is not competent in a provisional case to prove the dishonour of a bill of exchange. *De Ronde* v. *Zeyler* .. 382

15. ———— Evidence of signature, when denied in a provisional case, may be given instanter. *Dieterman* v. *Curlewis* 383

16. ———— Evidence to prove that which the plaintiff ought to have proved in chief, not allowed to be given in replication to contradict the evidence adduced by the defendant. *Watermeyer* v. *Kerdel's Trustees* 383

17. ———— It is not necessary to lead evidence to prove that an instrument *ex facie* a notarial act had actually been executed by the notary by whom it professed to have been executed. Notarial acts are evidence *per se* of the facts therein set forth. *Ryneveld* v. *Bain* 383

18. ———— The correctness of the record of a Circuit Court, as to the evidence, cannot be questioned incidentally in the Supreme Court; but the record may be amended on motion, supported by sufficient affidavits. *Ryneveld* v. *Bain* 384

19. ———— The 132nd Rule of Court, requiring documents put in proof by the plaintiff to be scheduled, amended so as to extend to the circuit as well as to the Supreme Court. *Widow of Nieuwenhuizen* v. *Nieuwenhuizen* 385

20. ———— The record, or an office copy of it, is evidence of a judgment of the Court. *A.* v. *B.* 385

21. ———— Notice to pay up a bond is provable by parol evidence or by affidavit. *Nederland's Executors* v. *Gnade* 386

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23. ———— The unsupported evidence of the woman with whom the adultery was alleged to have been committed, held insufficient *per se* to prove the adultery. *Weyers* v. *Stopforth* 386

24. ———— An affidavit by a notary of the service by him of a

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notice on the defendant to attend at the registrar's office and receive transfer, is inadmissible. A notarial act is required. *Roesch* v. *White* 387

25. EVIDENCE—Parol evidence is not admissible to prove notice of dishonour in a provisional case. *Anderson* v. *Hutton & Woest* .. 387

26. ——— Where a declaration alleges a ground of action arising before the 1st day of December or thereabouts, evidence may be led as to what occurred during the whole of the month of December. *Le Roex* v. *Van Wyk* 387

27. ——— Where in answer to an action for re-delivery of a transfer deed there was no special plea of *læsio enormis*, evidence cannot be led to show that the price stipulated by the contract of sale was less than one-half of the real value of the property, or to claim that the sale be set aside on that ground. *Broekman, Executrix of Darr* v. *Rens* 387

28. ——— Where a person has been bound over to keep the peace for a certain time, and within that time commits and is convicted of an assault, the record of such conviction is sufficient evidence of the assault in an action by the Crown to estreat the recognizance. *Queen* v. *Cloete* 388

29. ——— A merchant's books, verified by his oath, held *per se* insufficient to prove a balance of account in an action by default. *O'Connell* v. *Stander* 389

30. ——— An extra-judicial affidavit made by a notary since deceased, is not admissible as evidence. *Still* v. *Norton* 390

31. ——— Where a decree for the restitution of conjugal rights had been obtained, and thereafter a dissolution of the marriage on the ground of malicious desertion was prayed, copy of the previous judgment was considered proof of the marriage. *Van Blerk* v. *Naudé* 391

32. ——— Circumstances entitling a married man sued in an action for debauchment to make an oath of non-paternity. *Wilson* v. *Echardt* 392

33. ——— Insertion of a notice of dissolution of partnership in the *Gazette* is *primâ facie* evidence of its insertion by the firm of which the dissolution is so notified. *Phillips & King* v. *Chiappini & Co.* 393

34. ——— An affidavit held incompetent to prove indorser's waiver of due negotiation. *Trustees of Randall* v. *Haupt* 393

35. ——— In a prosecution under the Wine and Spirit Ordinance No. 94, sect. 4, for the sale without a licence of brandy not being the produce of the seller's lands, nor made from grapes otherwise procured or purchased by him, the *onus probandi* of those facts rests on the defendant, and not on the prosecutor. *Clerk of the Peace* v. *Enslin* 482

36. ——— Evidence of the contravention of the Ordinance No. 93 cannot be held to support a conviction on a charge of contravening Ordinance No. 94, sect. 4. *Ibid.*

37. ——— A power of attorney cannot be varied or explained by verbal or written declarations. *Dickson & Burnie* v. *Schonnbergh and others* 503

38. ——— In an action to admit a proof of debt where the defence is founded on the forgery of the instrument of debt, evidence of

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other forgeries were held inadmissible, except by way of rebuttal. *De Smidt* v. *Hoffmeyer and others* 510

EXCEPTION: *See* PLEADING.

EXCUSSION—Co-tutors may arrange among themselves for the active administration by one of their number, he to be first excussed for any fault of commission; but for the consequences of his omission all are liable *in solidum*, with benefit of division, but not of excussion. *Niekerk* v. *Niekerk* 68

2. ——— A deficiency on the face of the confirmed final liquidation account of a principal debtor's estate, and a certificate by the sequestrator that the debtor had no other property, is proof of a sufficient excussion of the principal debtor, in an action against the surety. *Hare q.q.* v. *Croeser* 206

EXECUTION—Writ of execution cannot be enlarged after lapse of the original return day. *Meyer* v. *Pohl* 102

2. ——— Where the plaintiff, in an action in which there was a right of appeal under the 50th section of the Charter of Justice, on the day he obtained judgment took out execution, and seized defendant's goods, the Court set aside the writ with costs. The defendant having lodged his appeal, a new writ was allowed to be issued on security being given in terms of the charter. *Lawton* v. *Rens* 493

EXECUTOR—A judgment against the executors of an estate set aside, the executors having before the date of the judgment surrendered the estate, and put an end to their capacity. *Norden* v. *Executors of Norden* 316

2. ——— Executors, unable to produce the will or codicil appointing them as such, allowed to prove their title by the production of a subsequent codicil, which recited the will and their appointment. *Executors of Naudé* v. *Executrix of Ziervogel* .. 354

3. ——— Executors of private and of partnership estates, although the same individuals, are in law considered as distinct *personæ*. *Ibid.*

4. ——— B.'s trustee recovered judgment against J.'s executor for £150, the amount of an undue preference, and costs. J.'s executor surrendered J.'s estate without satisfying the judgment. B.'s trustee thereupon sued J.'s executor for payment of the judgment and costs *de bonis propriis*, on the ground of his unfounded defence to the action. And so the Court decreed. *Norden, Trustee of Beningfield* v. *Brink, Executor of Jaeckels* 403

FISC—Ranked as preferent on estate of insolvent pachter, for pacht-money in arrears. *In re Lolly* 206

2. —— Government held to be preferent on the insolvent estates of auctioneers for the amount of the Government auction dues received by them and not duly paid. [But *vide* Act 5, 1861.] *In re Wolff and Bartman* 227

FOREIGNER—A foreigner, here only for a temporary purpose, and *sine animo remanendi*, held not to have acquired such a domicile in the colony as rendered him liable to military service under the provisions of the Ordinance No. 20, of 1846. *Da Costa* v. *Le Seur* 545

FORGERY: *See* EVIDENCE.

FRAUD—Action for: *See* ACTION.

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FRAUDULENT INSOLVENCY—It is a good answer to an indictment charging fraudulent insolvency under a second order of sequestration obtained during the subsistence of a former order, that the insolvent had not "duly surrendered" the second time, in terms of the section. *Brink, Trustee of Magodas* v. *Norden* .. 271

2. ——— Where an insolvent has been committed for trial on a charge of fraudulent insolvency, and is brought under examination before a commissioner of the Supreme Court, he can only decline to answer questions having a tendency to prejudice him on his trial. *In re Holtman* 302

GENERAL ISSUE: *See* PLEADING.

GOVERNMENT—The Government are liable to pay costs of suit. *In re Insolvent Estate of Buissinne* 394

2. ——— Damages given against the Government for loss suffered through failure to carry out a condition of sale of certain erven, that a plentiful supply of water would be furnished. *Attorney-General q.q. Colonial Government* v. *Hart* 558

GOVERNMENT GRANT—F. and the Government bargained for all the waste land belonging to Government lying between certain properties, without reference to any extent, quantity, or boundaries. F. actually got all the Government land so situated, but received a quit-rent grant specifying, and a diagram annexed thereto showing, an extent of land greater by 10½ morgen than the Government had power to grant or than F. had actually received. F. brought an action of damages. *Held*, that having bargained for and actually received the ground as above, he had no claim for damages, but only for a proportionate repetition of the quit-rent he had paid. *Liesching, Executor of Fichat* v. *The Colonial Government* 417

GUARDIAN: *See* TUTOR.

HALF-PAY—What proportion of half-pay claimable by creditors. *Blake* v. *Barrow*, and *Dickson & Co.* v. *Rogers* 152, 154

HEIR—Appointment of tutor for minor "heirs" does not include minor "legatees." *In re Dusing* 69

HYPOTHEC—Where an amount settled on a wife, then a minor, by ante-nuptial contract, becomes merged in the private funds of one of the trustees after the wife's majority, no tacit hypothec is created for such amount on the insolvent estate of such trustee. *In re Wright* 70, 270

2. ——— Minors in a foreign country are entitled equally as minors in the colony would be, to a tacit hypothec on the estate of the administering guardian. *Mathyssen* v. *Sandenberg's Trustees* 71

3. ——— As to preference of tutorial hypothec in contest with special mortgages. *Van der Poel's Executors* v. *Marais and others* 71

4. ——— Minors, whether heirs or legatees, have no tacit legal hypothec on the estates of executors for losses occasioned by them *quâ* executors. *In re Minnaar* 71

5. ——— A co-tutor having paid out of his own funds to his ward an amount misappropriated by his co-tutor, has a good action against such co-tutor, but does not without any cession, *eo ipso* acquire the minor's hypothec against such co-tutor. *In re Cloete* 74

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6. HYPOTHEC—A prior *pignus prætorium* preferent to posterior special hypothec. *In re Lond* 102

7. ———— A *pignus prætorium*, constituted by attachment, is equivalent to a *pignus mobilium* completed by tradition. Such a *pignus mobilium* is preferent to a prior tacit legal hypothec. *In re Woeke* 103

8. ———— When an attachment of goods by the magistrates' messenger has been completed, the *pignus prætorium* is not affected by the messenger's not taking a security bond, or not leaving a person in charge of the goods, or not removing them. *Moore* v. *Van Schoor* 103

9. ———— The sheriff's seizure gives no preference in the distribution where there is a seizure on two writs, the execution being not quite contemporaneous, but on the same day. [*Vide* Order No. 3, 1844, limiting the right of the posterior creditor to share *pro ratâ*.] *In re Wools* 114

10. ———— Whether an attorney has a lien for his costs on the sum recovered from his client's adversary, not merely as against his client but third parties and the Crown. [Not decided.] *Arend* v. *Hendrickse* 120

11. ———— The fisc has preference on estate of insolvent pachter, for pacht-money in arrear. *In re Lolly* 206

12. ———— Preference awarded to a prior general hypothec over a special hypothec of moveables not followed by possession. *In re Russouw* 208

13. ———— A bond creditor has preference in insolvency for interest up to the date of the payment of his claim, and not merely up to the date of the surrender of his estate. *In re Whitcomb* .. 211

14. ———— A medical man has no preference for medicines supplied before insolvency to an insolvent alive when his estate was sequestrated. *In re Roux* 212

15. ———— Government held to be preferent on the insolvent estates of auctioneers for the amount of the Government auction dues received by them and not duly paid. [*Sed vide* Act 5, 1861] *In re Wolff and Bartman* 227

16. ———— The Government was ranked preferently in insolvency on the separate estate of B., a partner in the firm of W. & B. The separate estate being insufficient the Government claimed preference on the partnership estate, but this claim was rejected. *In re Wolff and Bartman* 228

17. ———— There is no tutorial hypothec over the insolvent estate of a guardian until after the excussion of his co-guardian who was the administering guardian. *In re Liesching* 232

18. ———— A bond for uncertain amounts to be advanced in future, and containing a special and general mortgage, is, if duly registered, a valid bond and has preference. *In re Carter* .. 233

19. ———— *Per* MENZIES, J.—Non-registration, or a wrong registration, where it is the fault of the Registrar of Deeds, founds an action against him, but deprives the creditor of preference. *Ibid.*

20. ————A bond granted by an insolvent partly in security for antecedent debts and partly for fresh advances, set aside as an undue preference in so far as affected the antecedent debts, but

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sustained as a valid security for the fresh advances. *In re Liesching* 233

21. HYPOTHEC—Lien claimed by a book-keeper on the books of his insolvent employer, for moneys lent and advanced, refused. *Spangenberg's Trustee* v. *Cousins* 248

22. ——— No payment, or pignus, or hypothec, voluntarily made and constituted to or in favour of a creditor at a time when both creditor and debtor knew that the debtor was insolvent, in satisfaction of a debt then due and exigible by the creditor, can, in respect of such knowledge, and of its being the voluntary act of the debtor, be set aside as fraudulent, except where made or constituted at a time when another creditor or other creditors had had recourse to such proceedings for recovering their debts as in law to make them be deemed to be *æque instantes vel urgentes vel vigilantes* with the creditor to whom the payment was made, or in favour of whom the mortgage was constituted. *Neethling* v. *Blommestein's Trustees* 276

23. ——— For a debtor to remain quiet and allow one of his creditors to obtain, by regularly conducted legal proceedings, a *pignus prætorium* over part of his property, is not equivalent to a debtor's voluntarily granting a pignus to his creditor. *Ibid.*

24. ——— An attorney employed by an executor to recover a debt due to the testator has a preference on the amount of the judgment in the sheriff's hands for his costs of this action, but not for his account against the executor for other business done not in connection with the testator's estate. *Thomas* v. *Barker* 397

IMMATERIALITY—Exception of: *See* PLEADING.

INFORMALITY—Exception of: *See* MAGISTRATE'S COURT RULES.

INJUNCTION: *See* INTERDICT.

INJURY—LITERAL—It is no ground of exception to an action for libel brought against the writer and publisher of a certain work, entitled 'Researches in South Africa,' for defamatory statements therein made, that the libellous work was published in England. Copies having been circulated in the Colony, the Court held the writer, on his return to the Colony, where he had his domicile, to be answerable in such action. *Mackay* v. *Philip* 1

2. ——— Where the plaintiff is a public officer, and the acts imputed to him were acts committed in the execution of this public office, *veritas convitii* (*i.e.*, truth of the libellous words), is an answer to the action. So also is (as regards damages) the absence of any *animus injuriandi*, such *animus* to be gathered from the circumstances of each case; but proof that the defendant is not the original author or inventor, but merely the publisher of the statement complained of, will not in any way excuse. *Ibid.*

3. ——— The following words, published in a newspaper, held actionable:—"Singular epitaph on a quack doctor: Hereunder rots the corpse of Lubbert Marmoriset, escaped God knows where, as village or ship barber, Roman Catholic layman, yea, half priest, vile hypocrite, defamer of his wife, that faithless proselyte, too stupid for the syringe, run-away hospital nurse, useless either to man or beast, pitiful scribbler; in short, here is a quack, a man-murderer." *Horstok* v. *Boniface and others* 2

4. ——— Application of libel to a particular person proved

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by witnesses; but evidence proposed to be offered of witnesses who had read the epitaph, but who had not seen its application, refused for immateriality. *Horstok* v. *Boniface and others* .. 2

5. INJURY—LITERAL—In answer to the following words, written by defendant of and concerning plaintiff:—"I was obliged on my arrival out here to get rid of Mr. Sutherland [meaning the plaintiff] in consequence of frauds and delinquency," (meaning that the plaintiff had been guilty of fraud and criminal acts in trade); and further, "These Sutherlands [meaning the plaintiff and his brother James] have been trading on my capital for the last twelve years to their own benefit, and they will do the same with your property, or that of any other they can get hold of," the defendant justified by proof of an alleged fraud on H. M.'s Customs:—*Held*, that as the passages must be taken in conjunction, a plea of justification founded on alleged frauds on the revenue was no justification of the libellous words imputing frauds and delinquency committed by trading on defendant's property. *Sutherland* v. *McDonald* 6

6. ——— *Held* to be no libel to write of the plaintiff, who was in his official capacity the head of a commando (or burgher force), that "he was by no means exculpated from the suspicion at least of having forced them to a disgraceful retreat, if not flight." *Ryneveld* v. *Bain* 11

7. ——— *Semble*, admission by defendant of authorship of alleged libel, which appeared in a newspaper, does not free plaintiff from the necessity of proving the publication. *De Lettre* v. *Kiener* 12

8. ——— Facts tending to mitigate damages may be proved under the general issue, and without being specially pleaded. *Moodie* v. *Fairbairn* 14

9. ——— In answer to a defamatory letter addressed by defendant to the minister and churchwardens of the Dutch Reformed Church at Caledon, recommending them not to re-appoint the plaintiff elder, it was pleaded that it was a privileged communication under the regulations of the Dutch Church. The Court held it to be a malicious communication, made without reasonable and probable cause, and therefore not privileged. Where the communication is of such a nature as to make it privileged, the communicating party is not bound absolutely to prove the truth of the communication. It is sufficient if he can show just and reasonable grounds for his belief, and that he acted without malice. *Keyter* v. *Le Roux* 23

10. ——— Where two medical men in a letter accused a third of conduct derogatory to the character of a gentleman and of a medical man:—*Held* to be libellous. *Bailey* v. *Abercrombie and Chiappini* 33

11. ——— Justification pleaded after a full apology destroys the effect thereof, and is a deliberate repetition of the libel. *Ibid.*

12. ——— Damages and costs as between attorney and client awarded against a defendant for having maliciously and mischievously held up the plaintiff as an object of public ridicule, by means of caricature likenesses, published for the express and avowed purpose of annoying the plaintiff and hurting his feelings. *Lewison* v. *Philips* 37

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13. INJURY—LITERAL—When the alleged libel contains two distinct libellous charges, a plea is defective which, admitting the publication of the whole of the alleged libel, justifies only one of the charges, without in any way answering as to the other. *Hill* v. *Curlewis and Brand* 520

14. ——————— Allegations of absence of malice, and of publication through negligence, are not sufficient either to free an unpaid editor from damages or to mitigate the damages. *Ibid.*

15. ———VERBAL—"Coward" held actionable. *Hill* v. *Wallace* .. 1

16. ——————— Action for defamation brought by one passenger, a foreigner, against the other, also a foreigner at the Cape. [No objection was, however, raised as to the validity of the precedent arrest, or as to the jurisdiction of the Court.] *Ibid.*

17. ——————— It is not actionable for the maker of a promissory note to say to the holder, on its presentation for payment, "The whole of the said note has been paid long ago, and I owe plaintiff nothing," the fact being that a balance was still due. *Ruthven* v. *Poggenpoel* 1

18. ——————— It is not actionable to speak the following words *in rixâ* (*i.e.*, in a brawl): "Damned informer, damned rascal, damned vagabond, damned broken-nosed informer," compensated by retort of "liar," and shaking fist in face. *Powell and Husband* v. *Price* 3

19. ——————— The following words were held by a majority of the Court (Menzies, J., *diss.*), not actionable in an action *ad palinodiam* for *amende honorable et profitable*: "*Jou gemeene bliksem; jou bliksemsche smeerlap*" (equivalent to "You low rascal, you rascally blackguard"). *Wolff* v. *Van Hellings* 3

20. ——————— *Veritas convitii* cannot be pleaded in justification of words charging plaintiff with indecency and immodesty. [*Per* Menzies, J.: *Veritas convitii* can only be pleaded in justification where there is an absence of an *animus injuriandi*, which absence the law will presume in the accusation of a criminal act, or for the ends of public justice. Indecency and immodesty are not such acts.] *Sparks* v. *Hart* 3

21. ——————— *Veritas convitii* cannot be proved under a plea of general issue, even in mitigation of damages. [*Sed vide Moodie* v. *Fairbairn*, p. 14, where the contrary was decided.] *Martheze* v. *Van Reenen* 14

22. ——————— When a statement of reasonable grounds for suspicion of a robbery is a privileged communication, and made without malicious intention, it is unnecessary to prove the *veritas convitii* in order to free defendant in an action for slander from plaintiff's claim for damages. *Haupt* v. *Finlayson* 38

23. ——————— Where the slander complained of was, "He has made a false oath," and the words proved were, "He must have made a false oath":—*Held*, a fatal variance. The words "He must have made a false oath," are not actionable without extrinsic proof that they were used *animo injuriandi*. *Haupt* v. *Elster* 39

24. ——————— In an action for slander for words used by the defendant when under examination in a criminal case, the *onus probandi* is on the plaintiff to show the *mala fides* and malice of the witness, the falsehood of the statement, and absence of reasonable cause for belief in its truth. The proper form of action

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against such witness is an action on the case for damages, and not one for verbal injury. *Norden* v. *Oppenheim* 42

25. INJURY—VERBAL—Reasonable grounds for suspicion a defence to an action for verbal injury caused by making a charge of robbery. *Panter* v. *O'Driscoll* 62

26. ———— The defendant having pleaded, but failed in proving, justification to a slander charging the plaintiff with having been guilty of a fraudulent conspiracy, the Court, finding the defendant had probable cause, and that there had been impropriety of conduct on the part of the plaintiffs, gave judgment for nominal damages, each party to pay their own costs. *Hart and Canstatt* v. *Norden* 548

INSANITY—On an application to appoint a curator to an alleged lunatic, the Court refused the motion as prayed, but appointed a curator *ad litem*, and granted a writ to be served upon the alleged lunatic and his curator *ad litem*, to appear before the Court by his said curator to show cause why the said alleged lunatic should not be adjudged to be of unsound mind and incapable of managing his affairs, and only curators of his person and of his estate should not be appointed. *Ex parte Ziedeman* 93

2. ———— What evidence of insanity is sufficient to warrant appointment of curators. *In re Wiese* 93

3. ———— What not sufficient evidence of insanity to set aside a deed. *Steyn* v. *Curators of Wiese* 94

4. ———— A curator appointed to a person incapable, from deafness and consequent ignorance, of managing her affairs. *In re J. Rensburgh* and *In re H. P. J. Rensburgh* 99

5. ———— Release from curatorship on the ground of recovery of the lunatic. *Steyn* v. *Curators of Wiese*, and *In re Kemp* 94, 101

INSOLVENCY—A tutor is not *ipso facto* deprived of office by insolvency. *De Villiers* v. *Stukeris* 68, 207

2. ———— No tacit hypothec is created on the insolvent estate of a trustee under an ante-nuptial contract, for an amount settled on the wife, then a minor, which had become merged in the private funds of such trustee after the wife's majority. *In re Wright* 70, 270

3. ———— A surety in a bond granted in terms of the 43rd Rule of the Magistrate's Court, is not liable either for the goods or the debt, when, in consequence of sequestration, the goods attached have been taken possession of, and their proceeds distributed by, the trustee, to the exclusion of the attaching creditor. *Moore* v. *Van Schoor* 103

4. ———— A debtor whose estate is under sequestration, and who has not obtained his certificate, may be arrested on proof by affidavit that he intends to leave the colony. *Still* v. *Gilbert* 124, 260

5. ———— Assignation for value by an uncertified insolvent, of property acquired after insolvency, held good. *In re Estate Van As* 205

6. ———— The estate of an uncertificated insolvent is entitled to property acquired after insolvency. *Ibid.*

7. ———— G. sold on credit and delivered certain wine to W., whose estate was afterwards sequestrated. G. within six weeks reclaimed the wine or its proceeds. *Held*, that the sale having been on credit the *dominium* was vested in W., and G. was not

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entitled to reclaim or to a preference in W.'s insolvency. *Commissioner for the Sequestrator* v. *Vos* 205

8. INSOLVENCY—A deficiency on the face of the confirmed final liquidation account of a principal debtor's estate, and a certificate by the sequestrator that the debtor had no other property, is a sufficient excussion of such principal debtor. *Hare q.q.* v. *Croeser* 206

9. ———— An unconfirmed liquidation account of an insolvent estate is not a final sentence. *Nisbett & Dickson* v. *Richardson* 143, 206

10. ———— The fisc ranked preferent on estate of insolvent pachter, for pacht-money in arrear. *In re Lolly* 206

11. ———— No release from sequestration (under the old law) could take place before the expiration of the period allowed to creditors to lodge their claims, nor be effectual against the creditors who had not consented to such release. *In re Laubscher* 207

12. ———— A person discharging the debt of an insolvent after surrender, entitled to rank in the same order as the creditor whose claim has been discharged would have ranked. *Ibid.*

13. ———— Appeal by an insolvent whose estate is under sequestration is incompetent. *In re Richardson* 207

14. ———— After rehabilitation property not disposed of by the distribution account awarded, by majority of the Court (Menzies, J., *diss.*), to the creditors, there being still a deficiency in the estate. *In re Estate of De Villiers* 207

15. ———— Printing press and materials not exempt from execution in insolvency, as being tools of trade. *Storm* v. *Breda and another* 208

16. ———— Objection to ranking of debt on an insolvent estate, is to be made on motion, after notice calling on the creditor to show cause why his alleged debt should not be expunged. *In re Blanckenberg* 208

17. ———— Liquidation account amended by awarding preference to a prior general hypothec over a special hypothec of moveables, not followed by possession. *In re Russouw* 208

18. ———— Where a partnership estate had been sequestrated under the old law, the rehabilitation of a partner, whose private estate had not been surrendered, *held*, not effectual as against his private creditor. *Witham q.q. La Foret* v. *Nourse* 208

19. ———— A creditor absent when the rehabilitation was granted, may afterwards object to its validity any matter which, if duly summoned, he might have put forward. *Ibid.*

20. ———— When landed property in an insolvent estate does not realize at auction the amount of the mortgage, and is left unsold at the instance of the mortgagee, the debt or liability of the insolvent mortgagor is not thereby destroyed. *In re Theron* 208

21. ———— An insolvent, after the liquidation account has been confirmed, is entitled to oppose a decree of civil imprisonment, by objecting to the legality of the claim proved in his estate. *Villiers* v. *Le Riche* 144, 209

22. ———— In a sequestration under the old law, the liquidation account, when confirmed, was taken to be *res judicata* only as to assets awarded and distributed. *Ibid.*

23. ———— Civil imprisonment suspended during subsistence of sequestration, and insolvent liberated. *In re Hoffler* 209

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24. INSOLVENCY—An insolvent could not (under Ord. No. 64) surrender a second time while the first sequestration subsists. (But Ord. No. 6, 1843, ss. 128 and 129, leaves it at the discretion of the judges to accept subsequent surrender). *In re Forbes* 209

25. ——— Act of insolvency committed by one partner *quâ* partner, justifies the sequestration of the partnership estate, without proof that all the partners had committed acts of insolvency or had all made voluntary surrender. *In re Phillips* 210

26. ——— Rehabilitation did not discharge insolvent from a debt which the creditor had not claimed on the estate whilst under sequestration. (But *vide* Ord. No. 6 of 1843, s. 120). *Theunissen* v. *Volkwyn* and *De Vos* v. *Brink* 211, 230

27. ——— Provisional sentence given on a promissory note against an executor, the maker, although the estate was subsequently to the date of the note surrendered as insolvent. *Ross and others* v. *Muntingh* 211

28. ——— Interest must be paid to a creditor up to the date of the payment of his claim, and not merely up to the date of the surrender of the estate. *In re Whitcomb* 211

29. ——— An uncertificated insolvent may be a mandatory. *Silberbauer q.q. Davis* v. *McDonald & Sutherland* 212

30. ——— A medical man has no preference for medicines supplied before insolvency to an insolvent alive when his estate was sequestrated. *In re Roux* 212

31. ——— Where a petition for compulsory sequestration sets out more acts of insolvency than one, but the summons for adjudication only one, the Court will receive proof of all the acts stated in the petition, on amendment of the summons, giving time to the defendant, if necessary. *Simpson & Co.* v. *Fleck* .. 213

32. ——— One partner of a firm may petition for sequestration on a debt due to the firm. *Ibid.*

33. ——— What it is sufficient to set out in a petition for sequestration on a debt arising from dishonoured bills of exchange. *Ibid.*

34. ——— It is sufficient if the petitioning creditor's debt exists at the date of petition, without reference to whether it existed or not before the date of the acts of insolvency. *Ibid.*

35. ——— Meaning of the word "insolvency" in sect. 5 of Ord. No. 64. *Ibid.*

36. ——— The holder of a mortgage bond is entitled to preference on the debtor's sequestration, not to full arrears of interest which may be due on the bond before the date of sequestrate, but only to preference for such arrears of interest for one year in addition to that for the current year. *In re Meiring* 218

37. ——— There were twenty-five sureties of 1000*f.* each, for a sum of 25,000*f.*, which sum was reduced, by payment of 5000*f.* by the principal debtor, and 8000*f.* by eight of the sureties, to 12,000*f.* Plaintiff, a ninth surety, paid this balance, took cession of the bond, and brought an action against defendant, a tenth surety, for one-thirteenth share of the 12,000*f.*, being one-twenty-fifth of the 20,000*f.* unpaid by the principal debtor, and a proportion for four insolvent sureties. *Held*, he was liable for one-twenty-fifth of the 20,000*f.*, but not, under the stipulations of

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the bond, liable for the deficiency caused to plaintiff by the insolvency of the four sureties. *Du Toit* v. *Vos*.. 218

38. INSOLVENCY—A partnership estate can be surrendered as insolvent only on petition of all the partners, if in the colony. *In re J. & A. le Riche* 219

39. ———— Where a partnership estate was erroneously sequestrated on the petition of only one partner, and the order lodged with the sheriff, there were also lodged with the sheriff writs taken out subsequently to the erroneous surrender by creditors of the partnership. The sheriff suspended execution. On motion made to the Court, the erroneous surrender was quashed. All the partners then presented a petition for surrender in due form. A question arose as to whether the execution creditors would, under the circumstances, be entitled to a *pignus prætorium* by virtue of their suspended writs; but the Court found the creditors not entitled to insist that no order should be made on the new petition until after the lapse of a sufficient time to allow the sheriff to execute the writs. *Ibid.*

40. ———— Construction and effect of the words "thereunto required," in sect. 4 of Ord. No. 64. *In re Webster* 220

41. ———— Where, some months before the insolvency, the plaintiff purchased from the insolvent certain moveables, which moveables remained in the insolvent's possession on hire, and were taken possession of by his trustee the defendant, and in an action to recover this property the plaintiff put in notarial agreements of sale and purchase, and called evidence to show that, on the premises of the insolvent, the property had been pointed out to a neighbour as having been sold to the plaintiff and let to the insolvent, *held*, that there was no proof of such a *bonâ fide* sale and real and *bonâ fide* delivery as was in law sufficient to divest the insolvent of the right of property. *Rens* v. *Bam's Trustee* .. 221

42. ———— Non-consenting creditors entitled to the full amount of their debt, notwithstanding a composition in insolvency. *Meeser* v. *Mulder* 222

43. ———— The Court has no jurisdiction under Ord. No. 64, sect. 34, until after the Master has definitely rejected a claim sought to be proved. *In re Anderson* 222

44. ———— When the Master has not sufficient proof before him to admit a proof of debt, he ought expressly to reject it, and not to enter it short. *Ibid.*

45. ———— A trustee has no right to admit a proof of debt not admitted by the Master, even although he has the consent of a majority of creditors. *Ibid.*

46. ———— No one who is not a creditor having duly proved his debt, has *locus standi* to set aside a sale in the insolvency. *Ibid.*

47. ———— Damages recovered for detention of property belonging to an insolvent estate, from an alleged creditor, whose claim, however, the Court found to be of no legal effect. *Trustee of Bam* v. *Rens* 226

48. ———— The colonial Government held to be preferent on the insolvent estates of auctioneers, for the amount of the Government auction dues received by them and not duly paid. (But *vide* Act 5, 1861). *In re Wolff & Bartman* 227

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49. INSOLVENCY—W. & B. were partners in business as auctioneers, and afterwards surrendered both partnership and private estates. The Government had a preference on the separate estate of B. This separate estate being insufficient the Government claimed preference on the partnership estate. The trustees rejected the claim as not being for a partnership debt, and the Court upheld this decision. *In re Wolff & Bartman* 228

50. ———— Purchase of insolvent's assets by sole trustee allowed under peculiar circumstances, he being a mortgage creditor, and the other creditors adopting the sale and consenting that the purchase price should go in diminution of his bond. But no *strykgeld* (bonus) allowed to the trustee on his purchase *quâ* creditor. *In re Neethling* 228

51. ———— Can a creditor, who has not filed his claim before the final liquidation and distribution of the estate, oppose the insolvent's rehabilitation? *Zeyler* v. *Muller* 229

52. ———— B. passed a bond, January, 1826, for £150 to H., and as security ceded and delivered in pledge a bond dated January, 1821, by A. B., for £175, in which defendant had bound himself as surety and co-principal debtor. B. surrendered. The £150 bond was proved in his estate; and the £175 bond, ceded by his trustees to H., was now proceeded on to the extent of £150. De V. claimed a discharge on the ground that the £175 bond had not been proved on the estate of A. B. who had surrendered September, 1826, and been rehabilitated June, 1833; but the Court gave judgment for plaintiff with costs. *Executors of Hoets* v. *De Vos* .. 232

53. ———— A. and B. were guardians of a union, B. being the administering guardian. A. passed a bond in favour of B. as administering guardian, and afterwards became insolvent. *Held*, that the estate of A. was not subject to any tutorial hypothec until after excussion of the administering guardian, and then only for such balance as could not be so recovered. *In re Liesching* .. 232

54. ———— A bond for an uncertain amount to be advanced in future, and containing a special and general mortgage, is, if duly registered, a valid bond and has preference in insolvency. *In re Carter* 233

55. ———— A bond granted by an insolvent, partly in security for antecedent debts, and partly for fresh advances, set aside as an undue preference in so far as affected the antecedent debts, but sustained as a valid security for the fresh advances. *In re Liesching* 233

56. ———— A bond specially hypothecating shares in a ship belonging to the port of Cape Town, duly registered in the custom-house on the day it bears date, and likewise regulated in the public debt register two days after its date, held valid, although the proper endorsement on the ship's register of the particulars of the mortgage was not made until after the debtor's insolvency, the vessel being absent from Table Bay at the date of the mortgage, and the endorsement having taken place within thirty days of her return. *In re Carter* 246

57. ———— Where at a meeting of creditors it was resolved, in the absence of the mortgage creditor, that the trustee should offer bonus, and where this resolution had been confirmed by the Court, and the sale was held on published conditions, *held*, that the bond creditor, whose bond was not covered by the net proceeds of the

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sale, could not object to the payment of a fair bonus. He should have applied to the Court before the sale. *In re Van Helsingen* .. 247

58. INSOLVENCY—Whether an agreement made by A. with B., a creditor of C. whose estate is under sequestration, by which A. agrees to buy and B. to sell all B.'s right to the debt due to him by C., for a price less than its amount,—it being a condition of the agreement that B. shall, on receiving A.'s promissory note for the price, sign C.'s certificate of discharge—is, in respect of such condition, fraudulent and void, so that A. cannot sue B. for implement thereof [not decided.] *Steytler* v. *Low* 247

59. ———— Lien claimed by a book-keeper on the books of his insolvent employer, for moneys lent and advanced, refused. *Spangenberg's Trustee* v. *Cousins* 248

60. ———— It is not, by Ord. No. 6, 1843 (although it was by Ord. No. 64), a good defence against a provisional claim on a promissory note, that the payee who had endorsed the note was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. By Ord. No. 6, 1843, sect. 126, such endorsation would be good if made after the confirmation of the account and plan of distribution. *Smith* v. *Campbell* 248

61. ———— G. contracted to build a house for C., payment to be made in certain instalments, the last on the completion of the house. G. agreed with T. B. & Co. to draw bills on C., in favour of T. B. & Co. on the instalments. T. B. & Co. communicated this to C., who, in writing, undertook that when the instalments were due he would honour such drafts. In March, 1837, G. drew as arranged for the last instalment, and surrendered on the 11th of October, 1837, the building being still unfinished. His creditors would not complete the building. G. completed it himself. T. B. & Co. sued C. on the draft and his written undertaking. C. pleaded that he was indebted to G.'s estate, and not to the plaintiff's. *Held*, that the contract between G. and C. was terminated by G.'s insolvency, and that C. was therefore not bound to honour the draft in question. That the work done by G. after insolvency was done for the benefit of his creditors, notwithstanding their non-interference, and that C. was thus indebted to the estate for the value of such work to the extent of the unpaid instalment. *Thomson Brothers & Co.* v. *Cumming and Nourse* 249

62. ———— An acquittance by payment by a person knowing himself to be irretrievably insolvent, held bad, as being an undue preference under sect. 7 of Ord. No. 64. *Reed's Trustees* v. *Adams* 251

63. ———— A second sequestration, the order for which was granted in ignorance that there had been a previous sequestration, set aside, as the first was still subsisting. *In re Magodas* .. 253, 271

64. ———— A payment of £105, being the amount of an accommodation bill, by the insolvent, shortly before surrender, and when his estate was actually insolvent, set aside as an undue preference. *Breda's Trustee* v. *Volraad* 254

65. ———— On the order of sequestration of the vendor's estate, no conveyance *coram lege loci* having been effected, the *dominium* of immoveable property sold rests in the Master of the Supreme Court, and ultimately in the trustees for the benefit of creditors. *Harris* v. *Buissinne's Trustees* 256

66. ———— Part of the purchase-price of immoveable property sold and possession delivered but not transferred *coram lege loci*,

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having been paid by the purchaser to the vendor before the vendor's estate was sequestrated, the purchaser has a personal claim against the estate for damages sustained by non-fulfilment of the vendor's undertaking to perfect the sale by making legal transfer, and for restitution of the price; and the purchaser is entitled, for such personal claim, to be ranked concurrently with the other personal creditors of the vendor, but has no right of preference whatever. *Harris* v. *Buissinne's Trustees* 256

67. INSOLVENCY—Misappropriation or misapplication of the assets (dividends) of an insolvent estate by one of several trustees, without the knowledge and consent of his co-trustees, does not discharge such co-trustees of their liability to the creditors for such assets. *In re Crause* 257

68. ——— Where, at a meeting for the election of trustees, a majority in number of the creditors voted for A., and a majority in value for B. and C., and the magistrate returned A., B., and C. as having been duly elected, the election was declared null and void. *In re K.* 258

69. ——— An uncertificated insolvent (Ordinance No. 64 being then in force) purchased immoveable property then under mortgage. To enable the vendor to effect transfer, the plaintiff paid off the mortgage, and the insolvent, on receiving transfer *simul et semel* and *pari passu* executed a bond in plaintiff's favour for the amount. The trustee of the estate claiming the house, the plaintiff claimed that he should be allowed to prove his bond in the sequestration, and the Master having refused to admit the proof, on the ground that the debt had been contracted subsequently to the sequestration, the Court confirmed the Master's decision. [But in a subsequent action, the Court declared the bond a valid and effectual hypothec over the property.] *Leewner* v. *Trustee of Magodas* 259

70. ——— O., an uncertificated insolvent, carried on business after his insolvency with the knowledge, although not with the express permission, of his trustees, and sold goods to C., who knew of his insolvency. C. paid O. with two notes in his favour or order. O. endorsed the notes to S., who also knew of the insolvency. Subsequently S. took from C. directly, without O.'s name thereupon, two other notes in lieu of the first-mentioned notes, and now sued C. on one of them. C. pleaded no consideration; but the Court held that the delivery up of the first two notes was sufficient consideration to found this action. *Semble*:—If S. had sued on the notes originally given, it being proved that the insolvent had given and received valuable consideration for them, S. would have successfully maintained the action, even although the trustees had intervened and claimed on the notes. *Stretch* v. *Campbell* 259

71. ——— De V. was surety on a bond which stipulated that the principal debtor should be liable to pay on one month's notice. The principal debtor surrendered; and without notice having given to the surety he was now called upon to pay the amount of the bond. *Held*, that the insolvency of the principal debtor purified the condition as to notice, and made the bond immediately demandable from the surety. *Baard* v. *De Villiers*. *In re Deneys* 260, 309

72. ——— H. drew on Z. & Co. in favour of S. & Co. for £800 for advances on an intended shipment. The shipment did not

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realise the amount of the bill, which was protested for non-acceptance and non-payment, and returned by Z. & Co. to S. & Co. H. surrendered his estate. S. & Co. proved for the whole amount of the bill. On objection raised, the Court directed the proof to be amended into a proof for the balance. *In re Herron* v. *Searight & Co.* 260

73. INSOLVENCY—The trustee of the insolvent estate of A., a creditor on the estate of B., an insolvent, may, being duly authorized thereto by a majority of the creditors of A. in meeting assembled, sign the certificate of B. *In re Herrer* 262

74. ———— A creditor allowed to prove a partnership debt, for which, after the death of one partner, the surviving partner had signed promissory notes in the name of the firm, on the separate estate of such partner as well as on the joint estate of the firm. *In re Waters* 263

75. ———— Trustees have a discretionary right of selling estate shares by private sale. *Quære*:—Whether the trustees are entitled to charge commission on the gross amount for which estate shares have been sold, or only on the net amount received after payment of the amount for which the shares had been pledged [not decided.] *In re Waters & Herron* 268

76. ———— W. purchased, and partly paid for, certain immovable property, of which he did not, however, get transfer. G., a creditor of W., got judgment, and sued out a writ, by virtue of which the aforesaid immovable property was attached. W. surrendered. His trustee got transfer and sold the property and awarded G. a preference under the last attachment. A bond creditor objected. The Court set aside the preference, on the ground that W. had only a *jus ad rem*, which could not be attached by a writ founded on a *jus in re*. *Maynard* v. *Gilmer's Trustee* 116, 270

77. ———— Any person interested in an insolvent estate, succeeding in a motion against a trustee who has filed no account after the lapse of the limit of six months, is entitled to his costs, no matter what the trustee's reason may be. It is the trustee's duty *tempestive* to apply to the Court for further time to file his account. *Norden* v. *Brink* 270

78. ———— M. surrendered in January, 1835. His schedule contained the name of only one creditor, De V., who had due notice but did not prove. No other creditor proved, and no trustee was elected. M. continued to trade and made a certain payment in satisfaction of goods purchased from N. In May, 1839, he again surrendered. This being subsequently brought to the notice of the Court, the second order of sequestration was set aside on the 19th of November. On the 8th of November one B. purchased the claim of De V. On the 31st he proved it and elected himself trustee in the first sequestration, and brought an action against N. to have the payment to him set aside. *Held*, that B., not having been a creditor at the date of the first order for sequestration, was not such a creditor as is contemplated by the Ordinance *Brink, Trustee of Magodus* v. *Norden* 271

79. ———— N. took out execution on a judgment debt against B., and certain goods were seized by the sheriff. B. shortly after surrendered. N. claimed a preference by virtue of the attachment. B.'s trustees resisted, on the ground that the attachment had been fraudulently obtained by N., in connivance and collusion with B., at a time when the latter anticipated the immediate

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surrender of his estate. It was proved that the insolvent told the plaintiff after his debt had become payable, and had not been paid, that he was insolvent and had abstained from surrendering, and suggested to him to take legal proceedings for the recovery of his debt, admittedly with the intent that the creditor might secure himself, and that he had given assistance to the creditor in suing out the summons and receiving service thereof. *Held* (confirming *Meyer* v. *Dusing's Creditors*), that no payment, or pignus, or hypothec, voluntarily made and constituted to or in favour of a creditor at a time when both creditor and debtor knew that the defendant was insolvent, in satisfaction of a debt then due and exigible by the creditor, could, in respect of such knowledge, and of its being the voluntary act of the debtor, be set aside as fraudulent, except where made or constituted at a time when another creditor or other creditors had had recourse to such proceedings for recovering their debts as in law would make them to be deemed to be *æque instantes vel urgentes vel vigilantes* with the creditor to whom the payment was made, or in favour of whom the mortgage was constituted. That a bond creditor who had given notice calling up her bond is not, especially before expiry of the term of notice, such a creditor *instans et urgens*. That for a debtor to remain quiet and allow one of his creditors to obtain, by regularly conducted legal proceedings, a *pignus prætorium* over part of his property, is not equivalent to a debtor's voluntarily making payment or granting a pignus to his creditor. That the proved circumstances of this case, *ut supra*, did not amount to such collusion or fraud on the part of the insolvent as to render the pignus judicially obtained by the creditor reducible. *Neethling* v. *Blommestein's Trustees* 276

80. INSOLVENCY—Where it becomes necessary under the Ordinance to reckon by value, creditors of £30 must be creditors who have proved for £30 and upwards. It does not matter that their claims have, by dividends, been reduced to a sum under £30 at the time of reckoning. *In re Clarence and Ahlers* 282

81. ———— The abandonment of an agreement of sale under the 79th section of the Ordinance No. 6, 1843, has no other effect than to discharge the trustee of the creditors from all liability to fulfil any of the stipulations or conditions of the agreement which remained still unperformed or unfulfilled; and to entitle the seller to retain or obtain possession of the subject sold, and to sue the insolvent estate for any damage which he can prove to have been sustained by him by the non-fulfilment on the part of the insolvent of the agreement; but did not entitle the creditors to have the sale annulled and rescinded *ab initio*, nor to have matters restored to the same situation in which they were before the agreement was made, or before any of the stipulations or conditions had been performed or fulfilled; nor to reclaim from the seller any part of the price, of which, previous to the abandonment, he had obtained payment. *Smuts, Trustee of Neethling* v. *Neethling* 283

82. ———— To a declaration by M.'s trustee against N. for first instalment of purchase-money of a house, defendant pleaded compensation founded on two promissory notes made by M. before sequestration. To this it was replied, 1. That these notes had not been proved in the sequestration. 2. That the debts were not mutual. 3. That the sale was made not by M., but under assignment. 4. That the debts on the notes being concurrent, the

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allowance of compensation would have the effect of a preference over the other concurrent creditors. It was proved that M. surrendered on the 26th of April, 1844. On the 26th of January, 1844, M. had passed the two notes, one for £57 11*s.* 9*d.* payable 26th of May, 1844, in favour of defendant or order, which note had been indorsed in blank by defendant, was discounted by one J., and paid when due by defendant. The second note was for £29 9*s.* 7*d.*, made by M. in favour of the firm of Davis & Nathan, and discounted by them. It became due after the surrender, and was retired by the payees. On the 12th of March, 1844, M. had called a meeting of his creditors, at which defendant and Davis, for the firm of Davis & Nathan, being both present and concurring, an assignment to a trust company was agreed on. This assignment fell through, through the non-assent of some of M.'s other creditors. M. then gave a power of attorney to E., the secretary of the trust company, to sell the house in question, at which sale defendant became the purchaser. *Held*, that the plea of compensation was good in so far as founded on the note for £57, but bad on that for £29, in respect of which defendant had not given credit, nor had the cause of debt accrued until after the order of sequestration. That in respect to the £57 note, the cause of defendant's debt accrued on the 26th of January, the date of the bill, and not on the 25th of May, when sequestration having intervened, he paid it. That the mutuality of credit was on the 10th of April, the date of sale, and before notice of sequestration to defendant. That although there was no *concurrentia debitorum* on the 26th of April, the proviso to the 28th section of Ordinance 6, 1843, refers to the period when the credit was given or the debt accrued, and not to the period when the *concurrentia debitorum* took place. That the circumstances connected with the inoperative assignment made no difference in the principles to be applied, nor the non-proof in M.'s sequestration of the notes on which the compensation was founded. *Hiddingh, Trustee of Manuel* v. *Norden* 288

83. INSOLVENCY—A person, although knowing himself to be insolvent, and although his insolvency is known to those with whom he deals or contracts, may still lawfully dispose of and administer his property so long as his estate is not placed under sequestration, provided he do nothing fraudulent, or in contravention of the Ordinance; and all contracts made with third parties *bonâ fide* for their assistance in the administration of his estate before sequestration, at a fair and reasonable rate of remuneration to those parties for their trouble, will be valid. *Hiddingh, Trustee of Manuel* v. *Eaton, N.O.* 295

84. ———— It is necessary, to entitle a trustee to continue in his own name process commenced in the name of a person who has surrendered his estate, that such trustee shall apply, by suggestion, to the Court for substitution of his name on the record. No notice to the defendant of such application is necessary. *Chase, Trustee of Stretch* v. *Mekerk* 299

85. ———— Any creditor having a sufficient interest to prevent a compulsory sequestration may appear and oppose the application for having the sequestration adjudged, although the debtor himself does not appear. No notice of intention to dispute the act of insolvency alleged need, however, be served by such creditor: such notice is by the 148th Rule only necessary by the debtor himself. *Meyring* v. *Black and another* 300

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86. INSOLVENCY—Where an insolvent has been committed for trial on a charge of fraudulent insolvency and is brought under examination before a Commissioner of the Supreme Court, he can only decline to answer questions having a tendency to prejudice him on his trial. If he refuses generally to be sworn or to answer any question which may be put to him, it is the duty of the Commissioner to commit him for contempt. *In re Holtman* .. 302

87. ——— An insolvent, under examination before a Commissioner, is not of right entitled to the assistance of counsel. As a matter of favour the Court will allow of such assistance. *Ibid.*

88. ——— The adjudication of compulsory sequestration refused, and the provisional order superseded, where such order was obtained on a return to a writ of execution sued out on a superannuated and unrevived judgment. Refusal of an insolvent to point out property in satisfaction of such a writ is no act of insolvency under Order 6, 1843, sect. 4. *Brink* v. *De Lima* .. 304

89. ——— The fact that an insolvent had not, in his capacity as trustee of an insolvent estate, paid over money to a creditor in that estate, is no ground for withholding his own certificate, inasmuch as, notwithstanding the allowance of such certificate, his liability continued. *In re Buyskes* 305

90. ——— The word "property," in sect. 4, Ordinance 6, 1843, includes immoveable as well as moveable property; and where the creditor suing is the first mortgagee, the immoveable property of the debtor is "disposable" by the creditor in satisfaction of the judgment on his bond. The debtor need not in such case point out to the sheriff the hypothecated real property, since the bond informed him of it. The creditor, where the return on the moveables is insufficient, should sue out a writ attaching the immoveable property, and proceed to dispose of it by judicial sale. *Van der Poel* v. *Langerman* 307

91. ——— A surety and co-principal debtor, having renounced the benefits of excussion and division, may be sued directly, without notice or demand on the principal debtor, on himself receiving the notice to which the principal debtor is entitled. *In re Deneys* 309

92. ——— Creditors holding bonds in which the surety and co-principal debtor has renounced the benefits of division and excussion, are not contingent creditors where the principal debtor has not surrendered or been excussed, but are entitled to prove immediately on the surety's insolvent estate, and to vote in the election of trustee of such estate. *Ibid.*

93. ——— When an insolvent knows that his estate must be sequestrated unless his creditors will accept a composition or give him time, he contemplates the sequestration of his estate, within the meaning of sect. 84 of Ordinance No. 6, 1843. *Sunley's Trustees* v. *De Wet* 310

94. ——— Where L. made certain promissory notes in favour of S., and S. indorsed them to De W., and (the estates of L. and S. being surrendered) S.'s trustees caused the delivery of the notes to be set aside as an undue preference in an action against De W., and a forfeiture was decreed against him, *held*, that the amount of such forfeiture was the dividend to be received from L.'s estate, *i.e.*, the actual and not the nominal value of the notes. *Ibid.*

95. ——— A judgment against the executors of an estate set aside, the executors having, before the date of the judgment,

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surrendered the estate, and thus put an end to their capacity. *Norden* v. *Executors of Norden* 316

96. INSOLVENCY—Sect. 86, of Ordinance No. 6, 1843, does not qualify sect. 85 in the same way as it qualifies sect. 84. *Redelinghuy's Trustees* v. *Russouw's Trustees* 317

97. ———— Compensation of a contingent debt is not pleadable against a liquid present debt. *Ibid.*

98. ———— An indorsement over to a surety by a debtor of a promissory note, just prior to surrender, set aside as a transaction not in the ordinary course of business, but as giving an undue preference. *Ibid.*

99. ———— The 148th Rule of Court relative to compulsory sequestration, though made before the passing of Ordinance No. 6, 1843, continues in full force, and is applicable to and regulates the proceedings under sects. 5, 17, and 18 of that Ordinance. *Leeuwner* v. *Mechau* 322

100. ———— A mortgage bond passed shortly before surrender, set aside as constituting an undue preference. *Ross & Co.* v. *Butcher* 323

101. ———— A claim to set aside as an undue preference the delivery of certain bills by the insolvent to the defendants a few days before surrender, refused, such delivery being declared to have been made in the ordinary course of business. *Redelinghuys* v. *Morkel & De Villiers* 324

102. ———— The claim of one co-partner for over-advances is against his co-partners and their separate estates, and not against the company or its estate. *Norton's Trustees* v. *Norden's Trustees* 330

103. ———— An interdict granted restraining the cession or assignment of a certain debt due by L. to the respondent, who was in insolvent circumstances. *Dickson & Co.* v. *Sunley* .. 340

104. ———— N. died, leaving an estate and executors in this colony, and another estate and other executors in England. Z. obtained judgment in the colony against N.'s executors, and thereafter obtained compulsory sequestration of N.'s colonial estate, although it was opposed for N. that he had the English estate and executors. *Executors of Naudé* v. *Executrix of Ziervogel* 355

105. ———— An insolvent, successful in obtaining his rehabilitation, notwithstanding the opposition of creditors, not necessarily entitled to costs of such opposition. *De Lima* v. *Van der Berg* .. 401

106. ———— A trustee must give specific notice in his advertisement calling a meeting of creditors to consider proposals for arbitration of the special object of such meeting. *Manuel's Trustee* v. *Norden* 526

INTERDICT—The vestry of the Dutch Reformed Church at D'Urban interdicted from proceeding with a personal examination of a member of the Church until such vestry should have complied with the 76th Church Regulation, which requires a certain previous notice of accusation and proofs; and also from enregistering the said church member as the father of an alleged illegitimate child, and baptizing it in his name. *Niekerk* v. *Minister and Churchwardens of the Church at d'Urban* 334

2. ———— A debtor interdicted from doing any act in the management of his business, or disposal of his property and funds,

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without the consent and approbation of the inspecting creditors appointed to act as such by resolution of creditors passed at a meeting summoned by the debtor, the debtor having subsequently acted contrary to the tenor of such resolution. *Watson & Chase* v. *Lawton* 337

3. INTERDICT—A debtor in insolvent circumstances interdicted from making a cession or assignment of a certain debt due to him by L. The Court further ordered the amount of the debt to be attached in the hands of L., to answer an action instituted by the applicants against the debtor. *Dickson & Co.* v. *Sunley* 340

4. ———— Interdict granted, restraining the respondent from disposing of a waggon forcibly taken possession of by him, pending the hearing of an application for an order on him to restore the waggon, on the principle of *spoliatus ante omnia est restituendus*. *Executors of Haupt* v. *De Villiers* 341

5. ———— Interdict granted to restrain from breach of a contract not to carry on any business whatever at a particular place. *Willet* v. *Blake* 343

6. ———— It is competent to test the legality of a proposed dissolution of a banking company on an application for an interdict. *Maynard* v. *Proprietors of Colonial Bank* 590

INTEREST—Interest cannot be claimed from a tutor on behalf of minors to an amount exceeding the capital of their inheritance. *Niekerk* v. *Niekerk* 68

2. ———— Interest must be paid to a creditor in insolvency up to the date of the payment of his claim, and not merely up to the date of the surrender of the estate. *In re Whitcomb* 211

3. ———— A bond creditor is entitled to preference for interest due on his bond before the date of sequestration only to the extent of one year's interest in addition to that for the current year. *In re Meiring* 218

4. ———— *Quære:* Whether interest can be accumulated with capital in ascertaining whether an action is or is not competent to be brought in the resident magistrate's Court. *Master of the Supreme Court q.q. Orphan Chamber* v. *Cats* 398

5. ———— Interest is due from the day of payment specified in an instrument of debt, although no demand has been made, and although the instrument does not stipulate for interest. *Thibart* v. *Thibart* 472

JUDGE—Self-declinature of one of the judges on account of interest in the case. *Hawkins* v. *Breda* 413

JURISDICTION—The mere contemplated departure of a debtor from the jurisdiction of the Court is sufficient to warrant arrest. *Roberts* v. *Tucker* 130

2. ———— The Court has no jurisdiction under Ord. No. 64, sect. 34, as to proof of debts, until after the master has definitely rejected a claim sought to be proved. *In re Anderson* 222

———— EXCEPTION TO JURISDICTION OF COURT: *See* PLEADING.

———— *See* ARREST.

JUS AD REM—To immoveable property, attachment of, set aside: *See* ARREST, REAL.

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JUSTICE OF THE PEACE—Notice of action against justices for acts done in the execution of their office must be given at least one month before process is sued out. On failure of such notice, judgment given in favour of the justice. *Stadler* v. *Marsh* .. 467

JUSTIFICATION—PLEA OF: *See* PLEADING.

LÆSIO ENORMIS—Where the sum at which certain property was bought by N. from D. was below half the real value of such property at the time of sale, and it was moreover proved that D. at the time of the sale was of infirm mind, the Court, upon both grounds, set aside the sale and its consequences. *Broekman, Executor of Durr* v. *Rens* 365

2. ———————— *Læsio enormis* must be specially pleaded. *Ibid.*

LAND—ERRONEOUS GRANT OF: *See* GOVERNMENT GRANT.

LANDDROST AND HEEMRADEN—In how far the Board of Landdrost and Heemraden possessed the power of making regulations regarding the distribution of water, and of fixing penalties on contravention of them; and the power of the governor to legislate after the establishment of the Council of Government of 1825, discussed. *Haupt* v. *Clerk of the Peace, Stellenbosch* 553

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LEASE—Minority held a sufficient defence, without even allegation of the lesion of the minor, by the transaction [Menzies, J., *diss.*], against a provisional claim on a lease entered into by a minor with the assistance of his mother, not his legal guardian. *Gantz* v. *Wagenaar* 67

LEGATEE—Appointment of tutor for minor "heirs" does not include minor "legatees." *In re Dusing* 69

LIBEL: *See* INJURY, LITERAL.

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LIQUIDATION ACCOUNT—Signing the liquidation account in a minor's estate makes the person signing an administering tutor. *Niekerk* v. *Niekerk* 68

2. ———————— Unconfirmed liquidation account not a final sentence on which civil imprisonment can be obtained. *Nisbet & Dickson* v. *Richardson* 143, 206

3. ———————— After the liquidation account has been confirmed, an insolvent is entitled to oppose a decree of civil imprisonment by objecting to the legality of the claim proved in his estate. *Villiers* v. *Le Riche* 144, 209

4. ———————— In a sequestration under the old law, a liquidation account, when confirmed, was taken to be *res judicata* only as to assets awarded and distributed. *Ibid.*

5. ———————— It is the duty of the trustee of an insolvent estate to file an account within six months. If necessary he may apply to the Court for further time. *Norden* v. *Brink* .. 270

MAGISTRATE.—The resident magistrate has no jurisdiction to cancel the indenture of apprenticeship of minors on the ground of intended removal of the master. But *quære* as to the magistrate's jurisdiction to prevent the removal of the apprentices from the town, the residence of their parent, without such parent's consent.

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8. ———— It is not beyond a magistrate's jurisdiction to decide on a claim of £10, being the balance of an account, the total amount of which would have been beyond his jurisdiction. *Stenhouse* v. *Kirsten* 494

9. ———— A resident magistrate has no jurisdiction to decide as to the validity of an Ordinance duly promulgated as having been passed by the Governor with the advice and consent of the Legislative Council. *Municipality of Cape Town* v. *Morkel and De Villiers* 561

10. ———— A magistrate has no jurisdiction in a case for damages sustained by the diversion of a stream, where the right to the water was the question at issue. *Myburgh and others* v. *Cloete* 564

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2. ——— The parent's consent is necessary to render valid a promise of marriage by a union, *subsequente copulâ*, although the minor be emancipated; and it makes no difference in the principle to be applied that the defendant who was a minor when the pleadings closed and the trial terminated became major before judgment given. But if the action had been brought against defendant after majority, *Semble*, he would not have been entitled to found on his minority at the date of the contract. *Greef* v. *Verreaux* .. 67

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4. ——— *Semble*, minors are not liable to their tutors for costs of litigation concerning their property, entered into by their tutors without the authority of the Court. *Ibid.*

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6. ——— Minors are not entitled to recover interest to an amount exceeding the capital of their inheritance. *Ibid.*

7. ——— Appointment of tutors for minor heirs does not include minor legatees, who therefore have no preference on the estate of such tutors. *In re Dusing* 69

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receive: *Held*, that this was a discharge by him *pro tanto* of his claim under the grandfather's will, and bound his representatives. *Richert's Heirs* v. *Stoll & Richert* 69

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11. ——— Who entitled to the custody of an infant child born after a voluntary separation [no decision]. *Farmer* v. *Farmer* 70

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15. ——— Minors in a foreign country are entitled, equally as minors in the colony would be, to a tacit hypothec on the estate of the administering guardian. *Mathyssen* v. *Sandenberg's Trustees* .. 71

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20. ——— The Court, on the application of the tutor, after a reference to the Master, authorized an advance out of the capital sum of an inheritance, the interest of which was insufficient, for the purpose of enabling the minor to proceed to Europe for his education. *In re Fehrzen* 74

21. ——— In an action to complete a sale of property the Court granted absolution from the instance, the action being directed solely against the defendant as guardian, whereas in the deed of sale founded on, it was stated that the guardian only appeared as assisting the minor, to whom personally the sale was therein stated to have been made. *Day* v. *Gray* 75

22. ——— Where the paternal uncle, himself being one of the tutors dative of a minor, offered jointly with the paternal grandmother to maintain a minor five years old, at their own charge, the Court refused to make an order on the tutors dative to pay the interest of the minor's paternal inheritance to his mother, with whom he lived, for his maintenance, the mother having re-married and being in good circumstances. *In re Trueman* 76

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24. ——— No valid appointment can be made of tutor dative to a minor out of the colony and of the jurisdiction of the Court. *S. A. Association Tutors of Voget* v. *Executors of Widow Voget* 79

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26. ——— The request and consent of the father, as natural guardian of his children minors, and the consent of the other nearest relations, does not relieve the guardian of the minor's property from liability for maladministration. *Ibid.*

27. ——— The resident magistrate has no jurisdiction to cancel indentures of apprenticeship of minors on the ground of the intended removal of the Master. But *quære* as to the jurisdiction of the magistrate to prevent the removal of the apprentices from the town the residence of their parent, without such parent's consent. *Hurter* v. *Isaac* 85

28. ——— The donation of £500, secured by a duly registered bond of the father's debtor, in favour of the father as father and natural guardian of his minor son, was held a valid donation as against creditors, by a solvent father to his minor child. There is nothing contrary to public policy in permitting a solvent father to make a donation to his minor child by deed executed openly *coram lege loci*, and registered in the public registry of deeds. *Elliott's Trustees* v. *Elliott* 86

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2. ——— Interest on a mortgage having preference must be paid up to the date of the payment of the debt, and not merely up to the date of the surrender of the estate. *In re Whitcomb* 211

3. ——— The holder of a mortgage bond is entitled to preference, on the debtor's sequestration, on arrears of interest before the date of sequestration only for one year in addition to that for the current year. *In re Meiring* 218

4. ——— A surety to a bond still liable, although the bond has not been proved by the holder on the insolvent estate of the principal debtor. *Executor of Hoets* v. *Vos* 232

5. ——— A bond for uncertain amounts to be advanced in future, and containing a special and general mortgage, is a valid bond, in preference, if duly registered. *In re Carter* 233

6. ——— Where a bond for £500 already advanced on security of a special and general mortgage, and for future uncertain advances, was registered as a special bond for £500, without any mention in the registry of the future advances or of the general clause. *Held*, that as no particular form of registry is prescribed by law, such registration is sufficient. *Ibid.*

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7. MORTGAGE—Where such bond was stamped originally for £500, no objection to the bond can be taken on this ground, the stamp law making no provision for stamps on bonds for uncertain amounts. *In re Carter* 233

8. ———— *Per* Menzies, J.:—Non-registration, or a wrong registration, where it is the fault of the Registrar of Deeds, founds an action of damages against him, but deprives the creditor of preference. *Ibid.*

9. ———— A bond granted by an insolvent partly in security for antecedent debts and partly for fresh advances, set aside as an undue preference in so far as affected the antecedent debts, but sustained as a valid security for the fresh advances. *In re Liesching* 233

10. ———— A bond specially hypothecating shares in a ship belonging to the port of Cape Town, duly registered in the custom house on the day it bears date, and likewise registered in the Public Debt Registry two days after its date, held valid, although the proper endorsement on the ship's register of the particulars of the mortgage was not made until after the debtor's insolvency, the vessel being absent from Table Bay at the date of the mortgage, and the endorsement having taken place within thirty days of her return. *In re Carter* 246

11. ———— Where, at a sale of mortgaged property, the proceeds of the sale do not cover the amount of the bond, the bond creditor cannot object to the payment of a fair bonus, such bonus having been previously authorized at a meeting of creditors, and their resolution confirmed by the Court. *In re Van Helsingen* .. 247

12. ———— The insolvency of a principal debtor on a bond stipulating for one month's notice, *Held*, to purify the condition as to notice, and make the bond immediately demandable from the surety. *Baard* v. *De Villiers* 260

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14. ———— Parol evidence of the defence *non numeratæ pecuniæ* allowed to a provisional claim on a bond. *Bergh N.O.* v. *Krige and Bosman* 386

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3. ———— Rights of commonage over Crown lands can be

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acquired without any formal written grant from the Government. *Municipality of Swellendam* v. *Surveyor-General* 578

4. MUNICIPALITY—Land in the vicinity of a village "appropriated, set apart, and from time immemorial recognized as the common pasturage ground of the village," is land to which the inhabitants had acquired a right of common pasturage, the right of property in which, or at least the right of servitude over which, is vested in municipal commissioners by virtue of the 45th section of Ordinance No. 9, of 1836, and irrevocably so vested, so that the Government is completely divested of the power of alienating the land, at least in such a way as to impair or infringe upon the right of common pasturage. *Ibid.*

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2. ——— A notarial instrument admitted as evidence *per se* of the facts stated in it. *Ryneveld* v. *Bain* 383

3. ——— A notarial act of a notary of the service by him of a notice on the defendant to attend at the registrar's office and receive transfer, is required. An affidavit by the notary of the fact is inadmissible. *Roesch* v. *White* 387

4. ——— An extra-judicial affidavit, made by a notary since deceased, is not admissible. *Still* v. *Norton* 390

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3. ——— Provisional sentence granted to the cedent of a liquid obligation without notice having been previously given to the defendant of such cession. *Barry* v. *Barnes and Needham* 473

4. ——— Notice must be given, under statute 8 & 9 Vict. c. 93, sect. 79, to the collector of customs before action is brought against him for acts done in the exercise of his office. *Chiappini & Co.* v. *Field, Collector of Customs* 549

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2. ———— An act of insolvency committed by one partner *quâ* partner, justifies the sequestration of the partnership estate, without proof that all the partners had committed acts of insolvency, or had all made voluntary surrender. *In re Phillips* .. 210

3. ———— One partner of a firm may petition for sequestration on a debt due to the firm. *Simpson & Co.* v. *Fleck* 213

4. ———— A partnership estate can be surrendered as insolvent only on petition of all the partners, if in the colony. *In re J. & A. Le Riche* 219

5. ———— W. and B., partners in business as auctioneers, took out individual licences as auctioneers, and afterwards surrendered both partnership and private estates. Government was ranked preferently on the separate estate of B., for auction dues on sales held by him under his individual licence. The separate estate being insufficient, the Government claimed preference on the partnership estate. The trustees rejected the claim as not being for a partnership debt. The sureties for B. appealed to the Court, which upheld the decision of the trustee. *In re Wolff & Bartman* 228

6. ———— A creditor allowed to prove a partnership debt, for which, after the death of one partner, the surviving partner had signed promissory notes in the name of the firm, on the separate estate of such partner, as well as on the joint estate of the firm. *In re Waters* 263

7. ———— The claim of one co-partner for over-advances is against his co-partners and their separate estates, and not against the company or its estate. *Norton's Trustees* v. *Norden's Trustees* 330

8. ———— The insertion of a notice of dissolution of partnership in the *Gazette* is *primâ facie* evidence of its insertion by the firm of which the dissolution is so notified. *Phillips & King* v. *Chiappini & Co.* 393

9. ———— Non-liability of anonymous partners to third parties, and right of sleeping partner to claim on the estate of his partner sequestrated after dissolution of partnership, discussed. *Watermeyer* v. *Kerdel's Trustees* 424

10. ———— W. G. A. held a power of attorney from W. A. and R. W., carrying on business as partners in England and the Cape Colony. The firm was dissolved, and the partners, without specially revoking the power to W. G. A., nominated him and one H. to wind up the Cape business:—*Held*, that W. G. A. could not be interdicted by H. from granting sole receipts, and otherwise winding up the partnership estate. *Holliday q.q. Wise* v. *Anderson* 452

11. ———— After the dissolution of a partnership, neither of the partners can legally grant a valid and effectual power of attorney, in the name and under the signature of the late firm, to any person to collect the outstanding debts due to the firm,

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unless such partner were specially authorized to do so in the deed of dissolution or by some other deed executed by the other partner. *Kilian & Stein* v. *Norden* 530

PENALTY: *See* DAMAGES.

PENSION—What proportion of, claimable by creditors. *Dickson & Co.* v. *Rogers* 154

PERPETUAL SILENCE—Decree of perpetual silence granted on summons. *Norden, Executor of Horn* v. *Kilian & Stein* 550

2. ——— On a citation to institute action, or be barred by perpetual silence, it must be shown that the respondent "publicly" pretended to have a right of action. *Bergh and Wife* v. *Smuts and Wife* 583

PIGNUS: *See* HYPOTHEC.

PLEADING—On action against the writer and publisher of a book entitled 'Researches in South Africa,' brought by a colonial landdrost (or magistrate), for defamatory statements therein made, the defendant pleaded the *exceptio declinatoria fori* (*i.e.*, non-jurisdiction), on the ground that the grievances complained of were committed in England. This the plaintiff's replication denied. *Held*, that the *exceptio declinatoria fori* must be founded on some fact alleged in the declaration or admitted by the plaintiff, wherefore the exception was overruled. *Mackay* v. *Philip* .. 1, 346

2. ——— Where both the general issue and a plea of justification are pleaded to a declaration for libel, it is for the plaintiff to sum up first on the evidence led, and not defendant on his justification. *Ibid.*

3. ——— Where the defendant pleaded the general issue, and a plea of justification, the Court, in granting absolution from the instance, gave costs on the general issue, but condemned the defendant to pay to plaintiff the costs incurred by the latter with reference to the plea of justification, the defendant having led no evidence in respect thereof at the trial. *Ryneveld* v. *Bain* .. 11

4. ——— *Veritas convitii* cannot be pleaded in justification of words charging plaintiff with indecency and immodesty. [*Per* Menzies, J.:—*Veritas convitii* can only be pleaded in justification where there is an absence of an *animus injuriandi*, which absence the law will presume in the accusation of a criminal act, or for the ends of public justice. Indecency and immodesty are not such acts.] *Sparks* v. *Hart* 3, 359

5. ——— *Per* Wylde, C.J.:—A plea of justification to a declaration containing only one count must justify the whole of such count, and not deny one part and avoid another part thereof. *Per* Menzies, J.:—Such justification can be completely pleaded to part only. *Per* Kekewich, J.:—*Semble*, agreed with Wylde, C.J. *Ibid.*

6. ——— *Veritas convitii* cannot, in an action for slander, be proved under the general issue, even in mitigation of damages. [*Sed vide contrà, Moodie* v. *Fairbairn*, p. 14.] *Martheze* v. *Van Reenen* 14, 363

7. ——— Facts tending to mitigate damages may, in an action for libel, be proved under the general issue, and without being specially pleaded. *Moodie* v. *Fairbairn* 14, 364

8. ——— Where a defendant who, after being barred, was by

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order of Court allowed to plead on condition of pleading issuably, and then pleaded the general issue and a second plea, which was a bad plea of justification, but set out certain facts in mitigation of damages. *Held*, that in strictness of practice he was still in default, and that therefore it was for plaintiff to apply on motion to have the second plea declared irrelevant, and not to file an exception. *Moodie* v. *Fairbairn* 14

9. PLEADING—Exception taken to a plea, that defendant has not denied or confessed and avoided the allegations in the declaration, sustained. *Myburgh* v. *De Villiers* 20, 365

10. ———— Insufficiency of a plea of justification. *Beck* v. *Aldum & Harvey* 21, 367

11. ———— Justification pleaded after a full apology destroys the effect thereof, and is a deliberate repetition of a libel. *Bailey* v. *Abercrombie & Chiappini* 33, 369

12. ———— The proper form of action against a person for injurious statements made in the witness box, is an action on the case for damages, and not one for verbal injury. *Norden* v. *Oppenheim* .. 42

13. ———— Declaration held on exception to be bad for want of sufficient statement of the cause of action. *Brink q.q. Ely, Husband of Maynier* v. *Smuts* 81, 365

14. ———— The prayer for general relief at the conclusion of the declaration, only entitles the plaintiff to claim under it such other relief as he can competently claim in the particular form of action set forth in the declaration. *Smith* v. *Skinner, A. C. G.* 188, 379

15. ———— Collusion must be specially pleaded. *Smuts, Trustee of Neethling* v. *Neethling* 283

16. ———— An exception of non-qualification pleaded to the title of assignees, sustained. *Nisbet & Dickson* v. *Venables* 345

17. ———— *Actio redhibitoria* pleadable to whole sale, if part of the goods are of bad quality, and can be pleaded in answer to an action for the purchase-money. *Murray* v. *De Villiers* .. 345

18. ———— *Exceptio rei judicatæ* or *litis finitæ*, in respect of a previous criminal prosecution, no answer to a civil action for an assault. *Russouw* v. *Stuart* 345

19. ———— Under the general plea of *nihil debet* special defences cannot be set up. *Horn* v. *Loedolff et Uxor* 345

20. ———— Exception of uncertainty and inartificiality of plea sustained. *Horstok* v. *Boniface and others* 346

21. ———— Plea of *turpis causa* sustained. *Louisa and another* v. *Van der Berg* 346

22. ———— Exception of non-qualification overruled on the provision not pleadable again in the principal case. *Nisbet & Dickson* v. *Cooke* 346

23. ———— A plaintiff having claimed in his declaration against the defendant *in solidum*, as sole administering guardian and executor, cannot, on the same declaration, claim *pro parte* when the proof shows plaintiff to have been a joint administering guardian and executor. *Niekerk* v. *Letterstedt* 346

24. ———— Notice of filing of declaration allowed to be given in the *Gazette* when the defendant could not be found. *Pfaff* v. *Schenk* 347

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25. PLEADING—An exception of variance between the summons and declaration, on the ground that all the parties sued had not been declared against, overruled. *Meyer* v. *Carlisle and others*.. .. 347

26. ———— Where exception is taken against the mere form of pleading, no subsequent pleading should be filed. *Liesching* v. *Cuyler* 347

27. ———— Exception to a plea, for obscurity and uncertainty, in a case of verbal injury, allowed. *Bance* v. *Buckley* 347

28. ———— A defence not set forth in the plea cannot be maintained. *Lombard Bank* v. *Hammes, Husband of Storm* 349

29. ———— Where a person had obtained leave of the Court to intervene as co-defendant, and the plaintiff in his declaration did not join him as such co-defendant, declaration amended with costs. *Aspeling, Executor of Low* v. *Waldpot* 350

30. ———— Exception *non-qualificatæ* must be specially pleaded. *Aspeling, Executor of Low* v. *Waldpot, Livingston & Co.* v. *Dickson, Burnie & Co.* 350, 367

31. ———— The exception *rei judicatæ vel litis finitæ* is a plea on the merits, and not a preliminary exception. *Du Prez* v. *Rose* .. 353

32. ———— Where, in an action founded on a deed of submission to arbitration, the declaration introduced a statement not expressed in the said deed, an exception to the same on the ground of immateriality, sustained. *Strahan & Levy* v. *Meyer & Anderson* 353

33. ———— Compensation cannot be pleaded in respect of a judgment obtained by plaintiffs against R., against the costs of a rule obtained by R. against the plaintiffs, in so far as regarded the claim of R.'s attorney. *In re Richardson* 354

34. ———— The exception of non-qualification is a preliminary exception, to be disposed of before answering over on the merits. *Robertson & Osmond, Executors of Naudé* v. *Executrix of Ziervogel* 354

35. ———— Executors of private and of partnership estates, although the same individuals, must in law be considered as distinct *personæ*, and therefore it is not competent to plead against one of two private estate executors, a reconventional claim against him as a partnership estate executor. *Ibid.*

36. ———— In an action against agents it is requisite to aver grounds on which the action is maintainable against them as such, and not sufficient to aver that they are agents, the cause of action being against the principals in a foreign company. *Altenstedt* v. *Von Ludwig and another* 360

37. ———— Exception that a plaintiff is an uncertificated insolvent, and therefore cannot maintain an action as a mandatory, overruled. *Silberbauer q.q. Davis* v. *McDonald & Sutherland* 360

38. ———— Where plaintiffs introductorily alleged that they sued in their official capacity as administering the estate of one Dunn, but the body of the declaration did not further aver facts to found title, exception of non-qualification allowed. *Orphan Chamber* v. *Bailey* 361

39. ———— Where the declaration set forth that the defendant had agreed to pass "a mortgage bond on the said premises, with two personal securities," and prayed that the defendant be condemned to pass "*such* bond as aforesaid." *Held*, that the word "such" referred only to the nature of the bond, and did not include a

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claim that it should also be secured by the obligation of two personal sureties. *Still* v. *Weeks* 361

40. PLEADING—Exception of submission to arbitration overruled. *Rens* v. *Bam's Trustees* 362

41. ———— Where plaintiff's christian name "Daniel" was correctly stated in the summons and in the body of the declaration, but was erroneously given as "David" in the title of the declaration, the Court overruled an exception, holding that the title formed no part of the declaration, but was surplusage. *Rynbachs* v. *Rynbach, Executor of Morris* 362

42. ———— An admission in the plea by the wife, of having committed adultery, is not sufficient proof *per se* of the adultery. *Wylde* v. *Wylde* 362

43. ———— Exception of non-qualification to the title of the plaintiff on a lease of which he had received cession, overruled. *Smith* v. *House* 363

44. ———— Where an action is brought against the husband in respect of payment of money to the wife, to whom he was married by ante-nuptial contract, it is necessary to allege that the wife acted by the order and consent of the husband. *Brath* v. *Mulder* 363

45. ———— Form of action between partners. *Iles* v. *Jones and others* 363

46. ———— A declaration to recover the amount of a policy of marine insurance must allege an actual loss, and that such loss had taken place during the period specified in the policy. *Kiener* v. *Waters* 363

47. ———— A debtor bound himself by bond in a sum of £500, and M. and B. bound themselves as sureties for £250 each. B. was summoned individually for £250, without mention of M. in the summons. M. was separately summoned in the same way, without mention of B. The declaration was filed against both, as if they had been co-defendants in one summons. Exception was taken to the declaration on the ground of variance, and sustained by the Court. *Rogerson, N. O.* v. *Meyer and another* 364

48. ———— The exception *ineptæ cumulationis personarum*, being a dilatory exception, must be pleaded *initio litis*, and is not therefore a ground of absolution from the instance. *Ibid.*

49. ———— An exception of insufficient assignment of breach of bond must also be pleaded *initio litis*. *Ibid.*

50. ———— The non-excussion of the principal debtor must be excepted *initio litis*, before joining issue on the merits. *Ibid.*

51. ———— Exception *non-qualificatæ* to title of tutors appointed to a minor out of the jurisdiction, sustained. *S. A. Association* v. *Voget's Executors* 79, 365

52. ———— Compensation must be specially pleaded. *Still* v. *Norton* 365

53. ———— *Læsio enormis* must be specially pleaded. *Broekman, Executor of Durr* v. *Rens* 365

54. ———— In answer to the plaintiff's declaration praying the rescission of a sale of landed property on the ground of *enormis læsio*, the defendant, who had pleaded the general issue, maintained that the plaintiff should have alternately pleaded the

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setting aside the sale or the impletion of the price:—*Held*, that it was open to the defendant, in his plea, to have elected which he chose, but not having elected the impletion, and tendered the difference, he had lost his right of election. *Broekman, Executor of Durr* v. *Rens* 365

55. PLEADING—The plaintiffs alleged that the defendant H. was a notary public, employed by the late widow Z. to draw her will; that the plaintiffs were duly proposed and duly intended to be co-executors, but that the defendant had wrongfully, &c., refused to insert their names; wherefore having been so deprived of their fees, they brought this action. Defendant excepted on the ground of uncertainty that the declaration did not state by whom the plaintiffs were so proposed or intended, nor to whom the defendant refused; and the Court sustained the exception. *Stegmans* v. *Hofmeyer* .. 367

56. ———— Exception to a plea for uncertainty allowed, where, in answer to an action for wages of a shipmaster, the defendant opposed a general claim for unliquidated damages sustained through the master's neglect, without giving particulars thereof. *Dixon* v. *Grainger* 369

57. ———— When purchases by trustees in insolvency are not null and void *ab initio*, but voidable according to the circumstances, such circumstances must be specially pleaded. *Norden* v. *Bonnin's Trustees* 371

58. ———— Exceptions overruled, as containing matter of replication and not exception. *Chiappini & Co.* v. *Trustees of Jaffray* .. 371

59. ———— Where an action was brought in a Circuit Court to set aside a will, and the judgment of the Circuit Court was subsequently appealed from to the Supreme Court, the Appellant sought, as one ground of setting aside the judgment of the Circuit Court, to object that some of the heirs interested in the will had not been made parties to the action:—*Held*, that this should have been excepted in the Court below *initio litis*, and could not now be entertained. *Bekker* v. *Bekker's Executor* 374

60. ———— After pleadings had been closed, the Court refused to allow a plaintiff to insert in his declaration certain words which he alleged had been accidentally omitted from the declaration, although inserted in the summons. *De Vos* v. *Spaarman & Wagner* 375

61. ———— In an action against V. R. for trespass, defendant pleaded the general issue. At the trial defendant justified his acts by proof that he was a member of a road board, and had authority in that capacity to do what he had done:—*Held*, that not having specially pleaded his capacity and consequent authority, he could not so justify. *Dreyer* v. *Van Reenen* 375

62. ———— Absolution from the instance where plaintiff founded in his pleadings on a certain contract of sale, which contract the evidence proved to have been put an end to by the parties, and a new contract entered into. *Rose* v. *Cloete* 377

63. ———— Where a declaration alleged the cause of action as having arisen before the 1st day of December, or thereabouts, evidence may be led as to what occurred during the whole of the month of December. *Le Roex* v. *Van Wyk* 387

64. ———— Where a deceased person was barred by the rules of Court from declaring, his representatives seeking to proceed with the action are also barred. *Eksteen* v. *Hayward and Higginson* .. 421

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65. PLEADING—A plaintiff barred from declaring under the rules of Court may still show such merits as will free him from having judgment signed against him; and even where judgment has been so signed, he will still be allowed to file declaration on merits shown and terms imposed. *Potgieter & Tennant* v. *Meyer & another* 438

66. ——— An exception of *res judicata* is not pleadable in respect of a sentence of absolution from the instance. *Grimwood* v. *Balls* 448

67. ——— Where a defendant is regularly in default, he cannot, on the trial of the case, appear personally or by counsel. *Luck* v. *Owen* 456

68. ——— Where the plaintiff, in an action for damages for fraud, who had in error claimed for and recovered only the amount of certain promissory notes which were then due, afterwards sued in respect of the same transaction for the amount of a note which had subsequently matured, the exception of *res judicata* was held to be well pleaded, but that under the circumstances the plaintiff was entitled to relief against the error in the first action, and to recover the amount claimed in the second case. *Lawton* v. *Rens* 483

69. ——— An error in the summons as to plaintiff's name must be taken objection to *initio litis*, and not after issue joined. *Stenhouse* v. *Kirsten* 494

70. ——— Where in an action of sale and purchase the defendant first pleaded the general issue, and then by special plea admitted the purchase, but pleaded payment, held inconsistent pleas. *Havenga* v. *Steyn* 511

71. ——— Absence or insufficiency of warrant to sue must be founded on before issue joined and *ante litis contestationem*. Where an objection was raised in the middle of a case, the Court (Musgrave, J., *diss.*) proceeded with the case, and gave judgment, but stayed execution until the validity of such objection was thereafter inquired into. *Ibid.*

72. ——— In an action for libel for publishing a letter containing two distinct libellous charges, a plea admitting the publication of the whole of the alleged libel, but justifying only one of the charges, without in any way answering as to the other, is defective. *Hill* v. *Curlewis & Brand* 520

73. ——— Where A. B. granted a power of attorney to C. D., authorizing C. D. to institute legal proceedings on behalf of A. B., and when C. D. in his capacity as attorney of A. B., granted to an attorney of the Court the warrant or authority to sue, summons is good if issued in the name of A. B. alone, without mention of C. D. *Kilian & Stein* v. *Norden* 530

74. ——— No authority to institute an action which was not made known to a defendant who files an exception of non-qualification before he filed his exception, or at least before the plaintiff files his answer thereto, can be pleaded in answer to such exception. *Ibid.*

75. ——— The commissariat department hired from S. a waggon and oxen. This action was brought for their restoration or for damages. Defendant, without excepting, joined issue, and pleaded payment of a certain amount, which the plaintiff maintained was insufficient. Defendant argued that it was the custom and course

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of business in the commissariat department to have claims adjusted by a special board of claims, which the plaintiff had declined:—*Held* by a majority of the Court (Wylde, C.J., and Menzies, J.), that parties contracting with the commissariat department are not bound, unless they have expressly or tacitly so agreed, to submit their claims when disputed to the final decision of a commissariat board of claims, whatever may be the custom of the department requiring such submission, but may have recourse to a Court of law for the purpose of determining such claim. *Held* (by the same majority), that defendant not having excepted to the jurisdiction, but having joined issue on the merits, could not at the trial found on non-jurisdiction, even in a case where the Court really would have had no jurisdiction, had a proper declinatory plea of non-jurisdiction been filed. *Sands* v. *Cooper* 566

PLEDGE: *See* HYPOTHEC.

POST CONTRACTOR: *See* COMMON CARRIER.

POWER—A power of attorney granted by a firm in England to their manager in the colony not revoked by the dissolution of the firm, as far as related to the winding up of the concern of the firm here. *Holliday q.q. Wise* v. *Anderson* 452

2. ——— A power of attorney cannot be varied or explained by verbal or written declarations. *Dickson & Burnie* v. *Schonnberg and others* 503

3. ——— When A. B. grants to C. D. a power to commence legal proceedings, and C. D. gives to an attorney of the Court a warrant to sue, summons is good, if issued in the name of A. B. alone, without mention of C. D. *Kilian & Stein* v. *Norden* 530

4. ——— After dissolution of partnership no partner can legally grant a valid power of attorney, in the name of the firm, to collect firm debts, unless specially authorized by deed of dissolution, or other deed of other partner. *Ibid.*

PREFERENCE: *See* HYPOTHEC; INSOLVENCY.

PRIVILEGED COMMUNICATION—Showing a letter libelling a medical man at a meeting of a medical society (which society was a friendly association of medical men), not a privileged communication. *Bailey* v. *Abercrombie & Chiappini* 33

——————————— *See* INJURY.

PROCEDURE—It is necessary, to entitle a trustee to continue in his own name process commenced in the name of a person who has surrendered his estate, that such trustee shall apply, by suggestion, to the Court for substitution of his name on the record. No notice to the defendant of such application is necessary. *Chase, Trustee of Stretch* v. *Niekerk* 299

2. ——— One of the judges of the Supreme Court having declined to sit on account of interest in the case, and there consequently being no quorum under the then charter (1828), the hearing of the case was postponed. An application to remove the case in consequence to be tried at the Circuit Court was refused. Subsequently the new charter (1833), making two judges a quorum, came into effect, and the case was proceeded with and decided. *Hawkins* v. *Breda* 413

3. ——— Where a prisoner was sentenced by the Circuit Court

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to lashes on a certain day, and by an omission no warrant was made out or applied for until the record was in the Supreme Court, the Supreme Court granted a warrant. (The same was done in another case, where the deputy sheriff had suffered the day appointed in the warrant for the infliction of the lashes to pass, without having caused them to be inflicted.) *Queen* v. *Jantje* 465

PROMISE OF MARRIAGE: *See* MARRIAGE.

PROMISSORY NOTE—Provisional sentence granted on a promissory note against an executor, the maker, although the estate was, subsequently to the date of the note, surrendered as insolvent; the judgment of the Court being founded altogether on the liquid nature of the document. *Ross and others* v. *Muntingh* 211

2. ——— By Ordinance No. 6, 1843, sect. 126, the endorsation on a promissory note by the payee, a non-rehabilitated insolvent, would be good to enable the holder to obtain provisional sentence against the maker, if such endorsation be made after the confirmation of the account and plan of distribution. *Smith* v. *Campbell* 248

3. ——— The delivery up to the defendant of promissory notes for value made by defendant in favour of an uncertificated insolvent, and by him endorsed for value to plaintiff:—*Held*, sufficient consideration to sustain an action on a promissory note made by defendant direct in favour of the plaintiff. *Stretch* v. *Campbell* 259

4. ——— In a provisional claim on a promissory note parol evidence is not admissible to prove notice of dishonour. *Anderson* v. *Hutton & Woest* 387

5. ——— Affidavit held inadmissible in a provisional case to prove the waiver, by an endorser of a promissory note, of due negotiation. *Trustees of Randall* v. *Haupt* 393

6. ——— Where a promissory note is not made payable at any specified place, and summons is issued against the drawer, without previous presentment, if the defendant at once tender the amount to the plaintiff or his attorney, he will not be liable for the costs of the summons. *Brink* v. *Gough*; *Redelinghuys* v. *Theunissen*; *Steytler* v. *De Villiers* 396, 398, 408

7. ——— The debtor on a promissory note is not liable to the costs of a notice served on him by an indorser, the holder of the note. *Wicht* v. *Faure* 398

8. ——— Where the maker of a promissory notice specifying no place of payment, by first post after receipt of summons caused a tender to be made, held sufficient to free from costs. *Orlandini* v. *Pope* 403

9. ——— Provisional sentence granted on a promissory note where the signature had been previously denied, and the plaintiff had then failed to prove the same, but refused for the costs to which the defendant was put by such denial. *Birkwood* v. *Van Rooyen* 407

10. ——— Where a promissory note was made payable "in the month of October," at a particular place, and notarial protest was made on the 22nd November, such protest held unnecessary, and costs thereof allowed. *Beukes* v. *Van Wyk* .. 408

11. ——— Where a promissory note is made payable at

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a particular place on a particular day, and is presented at that place and not paid, the creditor is entitled to the costs of such presentment, although the notary have to travel a far distance to make it; but not if the note be duly paid. *Beukes* v. *Van Wyk* .. 408

PROSECUTION: *See* ACTION.

PRO-TUTOR: *See* TUTOR.

PROVISIONAL SENTENCE—Refused on a lease entered into by a minor with the assistance of his mother, not his legal guardian; and this without the allegation of the lesion of the minor by the transaction. [Menzies, J., *diss.*] *Gantz* v. *Wagenaar* .. 67

2. ——— Refused against a surety who had bound himself as security for any deficiency which might be caused by the default of an office-holder on a judgment obtained against such office-holder on his own admission in an action to which the surety was no party. *Sutherland* v. *Snell* 380

3. ——— In the provisional case proof of presentment of a bill of exchange, by notarial protest, cannot be negatived by parol evidence. *Hovil & Mathew* v. *Poultney* .. 381

4. ——— In the provisional case parol evidence is not competent to prove the dishonour of a bill of exchange. *De Ronde* v. *Zeyler* 382

5. ——— Evidence of signature, when denied in a provisional case, may be given instanter. *Dieterman* v. *Curlewis* 383

6. ——— Notice to pay up a bond provable on provision by parol evidence or by affidavit. *Nederland's Executors* v. *Gnade* 386

7. ——— Parol evidence of the defence *non numeratæ pecuniæ* allowed to a provisional claim on a bond. *Bergh N. O.* v. *Krige & Bosman* 386

8. ——— Parol evidence is not admissible to prove notice of dishonour in a provisional claim on a promissory note. *Anderson* v. *Hutton & Woest* 387

9. ——— A plaintiff having withdrawn a provisional summons, cannot proceed anew until the costs of the former summons have been paid. *Simson & Co.* v. *Fleck* .. 396

10. ——— Provisional sentence refused on an attorney's bill of costs where it did not appear that the same had been taxed in the presence of the party, or after due notice given him to attend the taxation. *De Wet* v. *Meyer* 397

11. ——— Provisional sentence granted on a promissory note where the signature had been previously denied and the plaintiff had then failed to prove the same, but refused for the costs to which the defendant was put by said denial. *Birkwood* v. *Van Rooyen* 407

12. ——— Provisional sentence refused to an attorney against his client, the plaintiff in a previous action, on a taxed bill for the costs in that action, which the defendant therein had been condemned but had failed to pay. Separate notice to his own client to attend at the taxation is necessary. *Dickson* v. *Geldenhuys* 409

13. ——— A superannuated provisional sen-

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tence of the Circuit Court revived by the Supreme Court. [Wylde, C.J., *diss.*] *Orphan Chamber* v. *Strydom* 417

14. PROVISIONAL SENTENCE—Provisional sentences granted, notwithstanding the existence of martial law in the district in which the defendan ts resided. *A.* v. *B.*; *Barry* v. *Van Rensburg* .. 446

15. ——————————— Provisional sentence granted to the cedent of a liquid obligation without previous notice to defendant of such cession. *Barry* v. *Barnes & Needham* 473

PURCHASE AND SALE—De K. got a promissory note drawn in his favour by Mostert, at the instigation and in the writing of R., who lent the money to Mostert through the medium of De K. De K. endorsed the note in blank and handed it to R., who sent De K. to purchase rice from Manuel in the name of the parties to the note and on its security. Manuel agreed to sell the rice. R.'s name was not mentioned in the transaction; only De K.'s and Mostert's. Manuel debited Mostert with the amount in his books. R. managed to get the rice delivered at his own stores and sold it on his own account. De K. neither got rice nor money. Mostert surrendered. Manuel proved for the amount of the note in his estate, and then brought this action against R. The Court held that the note not having been the *bonâ fide* property of either De K. or Mostert, the purchase and delivery was in reality by and to R., and that R. was liable in this action accordingly on the re-delivery of the note to him by plaintiff. *Manuel* v. *Rens* .. 498

2. ——————————— A conditional offer to sell, how far binding on the offerer before acceptance. [No decision.] *De Wet* v. *Smuts* 515

RECOGNIZANCE—A recognizance to keep the peace cancelled, for want of authority in the officer taking the same, and because there was no time specified for its continuance. *Van Renen* v. *Rorich* 447

RECONVENTION: *See* PLEADING.

RECORD—The correctness of the record of a Circuit Court cannot be questioned incidentally; but the record may be amended on motion supported by sufficient affidavits. *Ryneveld* v. *Bain* .. 384

2. ——— The record, or an office copy of it, is evidence of a judgment of the Court. *A.* v. *B.* 385

3. ——— When a person has been bound over to keep the peace, and during the subsistence of the bail is convicted of an assault, the record of such conviction is sufficient evidence of the assault in an action by the Crown to estreat the recognizance. *Queen* v. *Cloete* 388

REGISTRATION: *See* MORTGAGE.

REHABILITATION: *See* INSOLVENCY.

REPLICATION: *See* PLEADING.

RES JUDICATA—EXCEPTION OF: *See* PLEADING.

RESIDENT MAGISTRATE: *See* MAGISTRATE.

RETAINER: *See* COUNSEL.

REVIEW: *See* APPEAL.

RULES OF COURT—The Rule No. 148, requiring the debtor to give notice of his intention to dispute the act of insolvency alleged in

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the petition of a creditor praying for compulsory adjudication, does not extend to any other creditor opposing the application. *Meyring* v. *Black and another* 300

2. RULES OF COURT—The Rule No. 148, though made before the passing of Ordinance No. 6, 1843, continues in full force, and is applicable to and regulates the proceedings under sects. 5, 17, and 18 of that Ordinance. *Leeuwner* v. *Mechau* 322

———— Nos. 8, 9, 14, and 135: *See* ARREST, PERSONAL.

———— Nos. 18, 25, 26: *See* PLEADING.

———— No. 27: *See* COSTS.

———— Nos. 36, 37: *See* EXECUTION.

———— No. 111: *See* INSOLVENCY.

———— No. 132: *See* COSTS; EVIDENCE.

———— No. 149: *See* ATTORNEY.

———— No. 190: *See* APPEAL.

SALARY—What proportion of, claimable by creditors. *Sutherland* v. *Bird* 155

SCHEDULE OF DOCUMENTS: *See* EVIDENCE; PLEADING.

SEDUCTION—Circumstances entitling a married man to make an oath of non-paternity, in an action for debauchment. *Wilson* v. *Echardt* 392

2. ———— In an action for seduction and maintenance the Court gave £55 as damages, lying-in expenses, and bygone alimony, and £1 per month until the age of sixteen years, the defendant to enter into a bond with sufficient security for the monthly payments. *Ludekins* v. *De Villiers* 461

SEPARATION: *See* DIVORCE. .. ..

SEQUESTRATION: *See* INSOLVENCY.

SERVITUDE—Government may effectually constitute, either in favour of an individual or of a community, a servitude of pasturage, or any other kind of real servitude over land, the *dominium* of which is in the Crown, without any formal written grant from the Government. *Municipality of Swellendam* v. *Surveyor-General* .. 578

SET-OFF: *See* COMPENSATION.

SHERIFF—Costs of service of subpœna by a deputy sheriff out of the colony or beyond his district, disallowed. *Reis* v. *Muller* .. 402

2. ———— The sheriff, on making a personal arrest, must, if security is offered, take it not merely for the amount of the debt and costs mentioned in the writ, but also for £35 or £40 to cover further costs. *Stoll* v. *Brandt* 405

SHIP MORTGAGE: *See* MORTGAGE.

SHIPPING—Arrest of ship granted to found jurisdiction. *Wollaston & Co.* v. *Hunt, and In re Justitia* 110, 178

2. ———— Arrest to found jurisdiction, granted at the instance of an English creditor on an English contract, of a vessel at anchor in Table Bay. *Dunell & Stanbridge* v. *Van der Plank* 112

3. ———— Arrest of ship-master to found jurisdiction. *Montgomery* v. *Green* 171

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4. SHIPPING—Damages recovered by the plaintiff, a surgeon of a ship, against the master for assault and confinement in his cabin, and for leaving plaintiff behind at Table Bay instead of allowing him to continue the voyage to Bombay, although the plaintiff had disobeyed the captain's orders, and had been guilty of using improper language. [Menzies, J., *diss.*] *Montgomery* v. *Green* .. 171

5. ———— Reconventional claim by shipowners, to an action to recover the master's wages, for damages caused by the master's neglect to receive more cargo on board, disallowed, there being no allegation of *mala fides*, or evidence that the master, in refusing to receive more cargo, had acted contrary to sound discretion. *Dixon* v. *Grainger* 174

6. ———— What, under the circumstances of the case, was good and sufficient stowage on ship-board of certain machinery as to be an answer to an action for damages. *Prince* v. *Robinson* .. 175

7. ———— "Working days" in a charterparty construed to include every day, except Sundays or holidays, whether the weather may have admitted of work being done or not. *Brown* v. *Chiappini* 176

8. ———— The stipulation that a certain sum should be paid "per day, daily, and every day," for demurrage, entitles the plaintiff to demurrage for every day, including Sundays and holidays, after the demurrage commenced, although during some of those days, in consequence of accidents to the ship, the crew could not have taken in cargo. To make demurrage commence, nothing is required except the expiration of the stipulated period. *Ibid.*

9. ———— The plaintiff having given *primâ facie* evidence of the vessel's seaworthiness, which evidence was uncontradicted for the defence, presumption of law is in favour of the vessel's seaworthiness. *Chiappini & Co.* v. *Jones* 181

10. ———— Whom incompetent to abandon a vessel. *Ibid.*

11. ———— In an action for freight, on a charterparty, it is necessary for the plaintiff to prove that he has fulfilled all the conditions therein obligatory upon him, or that he has been prevented by the charterer from so doing. *Smith* v. *Skinner, A.C.G.* .. 188

12. ———— Where in an action for specific performance of a contract of charter, the declaration also contains a prayer for general relief, such prayer only entitles the plaintiff to claim under it such other relief as he can competently claim in an action of that particular form; he cannot, *e.g.*, claim remuneration for work and labour done, nor damages for the vessel's detention. *Ibid.*

SIGNATURE—Evidence of signature when denied in a provisional case may be given instanter. *Dieterman* v. *Curlewis* 383

SILENCE—DECREE OF: *See* PERPETUAL SILENCE.

SLANDER: *See* INJURY, VERBAL.

SPECIAL DAMAGES: *See* DAMAGES.

SPOLIE—Mandament of spolie granted. *Executors of Haupt* v. *De Villiers* 341

STATUTE 8 & 9 Vict. c. 93, s. 79: *See* COLLECTOR OF CUSTOMS.

STRYKGELD: *See* BONUS.

SUMMONS—Proceedings taken by a surviving partner for the revival of a decree of civil imprisonment obtained by the partnership

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firm, must be after special summons. Such revival cannot be had on motion. *Dickson* v. *Richardson* 146

2. SUMMONS—Summons for civil imprisonment must aver issue of writ of execution on judgment, and sheriff's return of *nulla bona*. *Ingram & Brothers* v. *Theunissen* 148

3. ——— Summons for civil imprisonment held bad for misjoinder, where founded on two separate judgments against separate defendants in two separate actions, although for the same debt. *Van der Berg* v. *Van Dyk* 150

4. ——— The record, evidencing a judgment of the Court, need not in any case be served with the summons. *A.* v. *B.* 385

SUPREME COURT—The Court will appoint guardians for and on behalf of juvenile emigrants brought to this colony. *In re The Committee for the Management of Juvenile Emigrants* 72

2. ——— On the application of the tutor the Court will authorize an advance out of an inheritance, the interest of which was insufficient, for the purpose of enabling a minor to proceed to Europe for his education. *In re Fehrzen* 74

3. ——— The Supreme Court has jurisdiction to revive a superannuated provisional sentence of a Circuit Court. [Wylde, C.J., *diss.*] *Orphan Chamber* v. *Strydom* 417

4. ——— A warrant for the infliction of lashes granted by the Supreme Court, to carry into effect a sentence of the Circuit Court, for which, through an omission, no warrant had been made out. *Queen* v. *Jantje* 465

5. ——— The Supreme Court is the only Court which possesses jurisdiction to try and decide the question of the validity of an Ordinance. *Municipality of Cape Town* v. *Morkel & De Villiers* 561

6. ——— Where P. had sold to S. certain landed property situate within the colony, purchase price to be paid within the colony, and S. failed in payment, P. summoned S. (who was resident out of the colony) by edictal citation for the balance of purchase-money, and alternatively the rescission of the contract. *Held*, that as the defendant was out of the colony, and as no property had been arrested *jurisdictionis fundandæ causâ*, no personal action lay, but that rescission of the contract itself could be declared. *Palm* v. *Simpson* 565

SURETY—Civil imprisonment decreed at the instance of an assignee of only half of a debt, which half such assignee had paid in his capacity as surety and taken cession of. *Schmitz* v. *Olivier* .. 151

2. ——— An agreement by a principal debtor to refer certain accounts to arbitration, does not bar his surety from debating such accounts. *Orphan Chamber* v. *Cloete* 157

3. ——— Under the stipulations of the bond in this case, a surety held not liable for the deficiency caused by the insolvency of his co-sureties. *Du Toit* v. *Vos* 218

4. ——— A surety to a bond held liable, notwithstanding that the holder had not proved the bond on the insolvent estate of the principal debtor. *Executor of Hoets* v. *Vos* 232

5. ——— The insolvency of the principal debtor on a bond stipulating for one month's notice, purifies the condition as to notice,

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and makes the bond immediately demandable from the surety. *Baard* v. *De Villiers*; *In re Deneys* 260, 309

6. SURETY—A surety and co-principal debtor, having renounced the benefits of excussion and division, may be sued directly, without notice or demand on the principal debtor, on himself receiving the notice to which the principal debtor is entitled. *In re Deneys* 309

7. ——— Provisional sentence refused against a surety who had bound himself as security for any deficiency which might be caused by the default of an office-holder, on a judgment obtained against such office-holder on his own admission in an action to which the surety was no party. *Sutherland* v. *Snell* 380

SURVEYOR—S., a land-surveyor, obtained and performed certain surveying work on Crown lands, first from the Landdrost and Heemraden of Uitenhage, and afterwards, on their abolition, from the Civil Commissioner of the division. The surveys were conducted under certain Government regulations. By a lax practice of office, to which the surveyor, for his own interest, was a consenting party, the terms of payment prescribed by these regulations were departed from, resulting ultimately in a loss to the surveyor, who then brought action against the Civil Commissioner for recovery of his fees:—*Held*, on appeal from circuit (Wylde, C.J., *diss.*), that the surveyor, having consented for his own interest at the time to a deviation from, and contravention of, the provisions of the regulations, which deviation had brought about a non-existence of the special funds out of which he was entitled to payment, he was barred from maintaining his present action. [And on appeal to the Privy Council the judgment of the majority of the Court was affirmed.] *Swan's Executors* v. *Van der Reit, Civil Commissioner of Uitenhage* 438

SUSPECTUS JUDEX: *See* JUDGE.

TACIT HYPOTHEC: *See* HYPOTHEC.

TENDER—It is a bad tender of costs to write: "Take notice that we have withdrawn the summons in the above case, and your costs thereon, when made up and taxed, will be paid by us on demand." *Simson & Co.* v. *Fleck* 396

2. ——— Where a promissory note not made payable at any specified place is sued on without previous presentment, if the defendant at once tender the amount to the plaintiff or his attorney, he will not be liable for the costs of summons. But a tender to the sheriff's officer is bad, if the officer is not authorized by the plaintiff to receive payment. *Brink* v. *Gough* 396

3. ——— Where the maker of a promissory note, not made payable at any specified place, by first post after receipt of summons, causes a tender to be made, held sufficient to free from costs. *Orlandini* v. *Pope* 403

4. ——— A defendant condemned to pay plaintiff's costs up to date of tender, plaintiff to pay defendant's costs incurred since that date. *Roscher* v. *Melck* 406

5. ——— Where the defendant in his rejoinder tendered £5 as damages, and at the trial judgment was given for one shilling damages, the Court held that the tender was not sufficient to deprive the plaintiff of the costs incurred by him subsequently to the tender, because the previous costs had not been tendered. *Liesching, Executor of Fichat* v. *The Colonial Government* 417

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TOOLS OF TRADE—Printing press and materials not exempt from execution as being tools of trade. *Storm* v. *Breda* 208

TRADITION—An agreement of sale of immoveable property followed by delivery of possession by the vendor to the purchaser, gives the purchaser nothing more than a *jus ad rem*, and a personal claim against the vendor to convey the *jus in re* or *dominium* to him, by transfer *coram lege loci*. *Harris* v. *Buissinne's Trustee* .. 256

TRANSFER—Government duty payable on the transfer of exchanged estates. *Civil Commissioner of Clanwilliam* v. *Low* 523

TRESPASS—It is sufficient for a plaintiff bringing an action for trespass, the defendant having pleaded only the general issue, to prove his lawful occupation and possession at the date of such trespass, and not his title to the land. *Breda* v. *Hofmeyr* .. 459

TRUSTEE—A trustee in an insolvent estate has no right to admit a proof of debt not admitted by the master, even although he has the consent of a majority of creditors. *In re Anderson* 222

2. ———— Purchase of insolvent's assets by a sole trustee allowed under the circumstances, he being a mortgage creditor, and the other creditors adopting the sale, and consenting that the purchase price should go in diminution of his bond. But no *strykgeld* (bonus) allowed to the trustee on his purchase *quâ* creditor. *In re Neethling* 228

3. ———— The immoveable property of an insolvent vests, on the order of sequestration, in the master of the Supreme Court, and ultimately in the trustees of the insolvent estate, for the benefit of creditors. *Harris* v. *Buissinne's Trustee* 256

4. ———— Mis-appropriation or mis-application of the assets of an insolvent estate by one of several trustees, without the knowledge and consent of his co-trustees, does not discharge such co-trustees of their liability to the creditors for such assets. *In re Crause* .. 257

5. ———— Where, at a meeting of creditors in an insolvent estate held for the election of trustees, a majority in number voted for A., and a majority in value for B. and C., and the magistrate returned A., B., and C. as having been duly elected, the election was declared null and void. *In re K.* 258

6. ———— The trustee of A., duly authorized thereto by a majority of the creditors at a meeting held for the purpose, may sign the certificates of B., an insolvent. *In re Herrer* 262

7. ———— Trustees have a discretionary right of selling estate shares by private sale. *Quære*, whether the trustees are entitled to charge commission on the gross amount for which estate shares have been sold, or only on the net amount received after payment of the amount for which the shares had been pledged [not decided]. *In re Waters and Herron* 268

8. ———— A trustee is liable in costs to any person interested in an insolvent estate, who may succeed in a motion against him for not filing an account after the lapse of six months, no matter what the trustee's reasons for delay may be. In such a case it is the duty of the trustee *tempestive* to apply to the Court for further time to file his account. *Norden* v. *Brink* 270

9. ———— To entitle a trustee in insolvency to continue in his own name process commenced in the name of the person who has surrendered his estate, it is necessary that such trustee shall apply,

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by suggestion, to the Court for the substitution of his name on the record. *Chase, Trustee of Stretch* v. *Niekerk* 299

10. TRUSTEE—A trustee is personally liable for costs improperly incurred. *Myburgh* v. *Commissioner for Sequestration* 394

11. ——— Costs given against trustees *de bonis propriis* for refusal to make transfer under a will. *Kotzé* v. *Kotzé's Trustees* 401

12. ——— Costs given against trustees under a deed of separation for inadvisedly defending an action. *Devenish* v. *Peacock and Joseph* 503

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TUTOR—A tutor is not *ipso facto* deprived of his office by his insolvency. *De Villiers* v. *Stukeris* 68

2. ——— Tutors cannot recover what they have expended, without the authority of the Court, on the education of their ward, more than the annual income derived from the minor's property. *Prince q.q. Dieleman* v. *Berrange* 68, 395

3. ——— Guardians entering into litigation concerning the property of minors, without the authority of the Court, are personally liable for the costs, and cannot, if unsuccessful, recover from the minors. *Ibid.*

4. ——— Co-tutors may arrange among themselves for the active administration by one of their number, he to be first excussed for any fault of commission; but for the consequences of his omission all are liable *in solidum*, with benefit of division, but not of excussion. *Niekerk* v. *Niekerk* 68

5. ——— The least act of administration renders the person committing it an administering tutor, *e.g.*, the signing of the liquidation account. *Ibid.*

6. ——— Where at the date of majority some of the co-tutors were insolvent, the minors are entitled to recover proportionately from the solvent tutors; but not where the insolvency has taken place since majority. *Ibid.*

7. ——— Interest cannot be claimed from a tutor on behalf of minors to an amount exceeding the capital of their inheritance. *Ibid.*

8. ——— Appointment of tutors for minor heirs does not include minor legatees, who therefore have no preference on the estate of such tutors. *In re Dusing* 69

9. ——— A person who was really only a joint administrator, having acted as pro-tutor, liable as such towards minors. [*Sed vide* Act 5, 1861, sect. 8, sub-sect. 3.] *In re Hoffman* 69

10. ——— No tacit hypothec is created on the insolvent estate of a trustee under an ante-nuptial contract for an amount settled on the wife, then a minor, which had become merged in the private funds of such trustee after the wife's majority. *In re Wright* 70, 270

11. ——— A co-tutor having paid out of his own funds to his ward an amount misappropriated by his co-tutor has a good action against such co-tutor, but does not without any cession, *eo ipso*, acquire the minor's hypothec against such co-tutor. *In re Cloete* .. 74

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14. TUTOR—No valid appointment can be made of tutor dative to a minor out of the Colony and the jurisdiction of the Court. *S. A. Association, Tutors of Voget* v. *Executors of Widow Voget* 79

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17. ——— A. and B. were guardians of a minor, B. being the administering guardian. A. becoming insolvent, it was held that his estate was not subject to any tutorial hypothec until after the excussion of the administering guardian. *In re Liesching* .. 232

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2. ——— In an action to complete a sale of property, directed against the defendant as guardian, whereas the deed of sale founded on stated that the guardian only appeared as assisting the minor, to whom personally the sale was made, the Court absolved the defendant from the instance in respect that the minor herself was not called as a party. *Day* v. *Gray* 75

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VERITAS CONVITII—How far an answer in an action for libel: *See* INJURY.

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WHALE—The right of property in a whale killed in one of the bays of this colony, is to be decided by the rules and principles of the Roman-Dutch law respecting the acquisition of animals *ferœ naturæ*, and not by regulations regarding whale fisheries in other parts of the world. *Langley* v. *Miller* 584

2. ——— A whale mortally wounded so as to render it unable to keep the sea, and so mastered as to make it impossible for it to escape from the person who has mortally wounded it, is the property of that person. Assistance given in such circumstances does not entitle the person assisting to any share in the whale. Where assistance has been rendered, and without such assistance the whale might possibly have escaped, the majority of the Court [Menzies, J., *diss.*], being unable to estimate the value of such assistance, awarded to each party half the net proceeds of the whale. *Ibid.*

WIFE—After a divorce for adultery, the innocent wife held entitled to the custody of a boy six years old, the offspring of the marriage. *Farmer* v. *Farmer* 70

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WILL—Where a will or codicil is lost or cannot be produced, the executors under it are allowed at a trial to prove their title by the production of a subsequent codicil, reciting the will or former codicil, and also the fact of their appointment therein as executors. *Executors of Naudé* v. *Executrix of Ziervogel* 354

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2. ——— Privilege from civil arrest accorded to a witness in a criminal case. *Richardson* v. *Nisbet & Dickson and the Sheriff* .. 123

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